(29,092)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 542.

WILLIAM A. PRENDERGAST ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL., APPELLANTS,

vs.

NEW YORK TELEPHONE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 *Equity Subpœna.*

[Seal of the Court.]

The President of the United States of America to William A. Prendergast, William R. Pooley, Charles Van Voorhis, Oliver C. Semple, Charles G. Blakeslee, the persons constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission, and Charles D. Newton, Attorney General of the State of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by New York Telephone Company, a corporation, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two Hundred and fifty Dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 29th day of March in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-sixth.

ALEX. GILCHRIST, JR.,
Clerk.

CHARLES T. RUSSELL,
STETSON, JENNINGS & RUSSELL,
Sol'rs Complainants.
15 Dey St.

The Defendants are required to file their answer or other defense in the above cause in the Clerk's Office of this Court on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

1 (Copy.)

Form No. 302.

I hereby certify, That on the 30 day of March, 1922, at the City of New York, in my district, I personally served the within Subpœna in Equity upon the within-named Defendant Ledyard P. Hale, Counsel to said Public Service Commission at 30 Church St., N. Y.

C. by exhibiting to him as per admission endorsed herein the within original, and at the same time leaving with him a copy thereof.

WM. C. HECHT,
United States Marshal,
Southern District of New York.

Dated March 30, 1922.

(J. W. P.)

3 Original. Original.

E. 23-252.

Personal service of within subpœna on Charles D. Newton, Attorney General of State of New York, is hereby admitted Mch. 30, 1922.

CHARLES D. NEWTON,
Atty. Gen.,
By THEO. F. FENNELL,
First Deputy Attys. Gen.

Personal service of within Subpœna on William A. Prendergast, William A. Pooley, Charles Van Voorhis, Oliver C. Semple, Charles G. Blakeslee & Ledyard P. Hale is hereby admitted March 30, 1922.

LEDYARD P. HALE,
Atty., in Person & Counsel to Public Service Commission of the State of New York.

U. S. District Court, S. D. of N. Y. Filed Mar. 31, 1922. 25¢. #1041.

4 I hereby certify, That on the 30 day of March, 1922, at the City of New York, in my district, I served the within Subpœna in Equity upon the within named Defendants, William A. Prendergast, William R. Pooley, Charles Van Voorhis, Oliver C. Semple and Charles G. Blakeslee, the persons constituting the Public Service Commission of the State of New York by exhibiting to Ledyard P. Hale as Counsel for said Commission as per admission of service endorsed herein at 50 Church St., N. Y. C. the within original, and at the same time leaving with him a copy for each thereof.

WM. C. HECHT,
United States Marshal,
Southern District of New York.

Dated Mar. 30, 1922.

(J. W. P.)

5&6 District Court of the United States, Southern District of New York.

In Equity.

No. 23–252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST, WILLIAM R. POOLEY, CHARLES VAN Voorhis, Oliver C. Semple, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission, and Charles D. Newton, Attorney General of the State of New York, Defendants.

Bill of Complaint and Affidavits on Application for Interlocutory Injunction.

Charles T. Russell,
Stetson, Jennings and Russell,
Solicitors for Plaintiff.

John L. Swayze,
John W. Davis,
Of Counsel.

U. S. District Court, S. D. of N. Y. Filed May 22, 1922.

7 District Court of the United States, Southern District of New York.

In Equity.

No. 23–252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST, WILLIAM R. POOLEY, CHARLES VAN Voorhis, Oliver C. Semple, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission, and Charles D. Newton, Attorney General of the State of New York, Defendants.

Bill of Complaint.

To the Judges of the District Court for the Southern District of New York:

The New York Telephone Company, plaintiff, brings this its bill of complaint against the defendants, William A. Prendergast, Wil-

liam R. Pooley, Charles Van Voorhis, Oliver C. Semple, and Charles G. Blakeslee, the persons constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission; and Charles D. Newton, Attorney General of the State of New York, and for its cause of action alleges:

8 I.

The plaintiff, the New York Telephone Company, is a corporation duly created and existing pursuant to the laws of the State of New York, and during all the times herein referred to has owned and operated a telephone system in and generally throughout the State of New York, and in parts of the states of New Jersey and Connecticut, furnishing to the public telephone exchange service, and both intrastate and interstate telephone toll service.

II.

The defendants, William A. Prendergast, William R. Pooley, Charles Van Voorhis, Oliver C. Semple, and Charles G. Blakeslee, are the persons constituting the Public Service Commission of the State of New York, which is an administrative body duly created by the statutes of said state, and they will hereafter be referred to collectively as the Public Service Commission; the defendant Ledyard P. Hale is counsel to said Public Service Commission; and the defendant Charles D. Newton is the Attorney General of the State of New York. The said defendants are citizens and residents of the State of New York. The defendant William A. Prendergast is a citizen and resident of the Eastern District of New York; the defendants William R, Pooley, Charles Van Voorhis, and Charles D. Newton are citizens and residents of the Western District of New York; the defendants Charles G. Blakeslee and Ledyard P. Hale are citizens and residents of the Northern District of New York; and the defendant Oliver C. Semple is a citizen and resident of the Southern District of New York.

9 III.

This suit is of a civil nature in equity and is brought for the purpose of enjoining the enforcement of two certain orders of said Public Service Commission, dated March 3rd, 1922, prescribing the maximum rates for telephone service to be charged by plaintiff on and after April 1st, 1922, within the State of New York, as more particularly stated hereinafter, and arises under the Constitution and laws of the United States, in that, as plaintiff avers, the rates prescribed in said orders are confiscatory of plaintiff's property used or useful in furnishing said telephone service to the public, and said orders therefore seek to deprive plaintiff of its property without due process of law and deny the plaintiff the equal protection of the laws in violation of its rights under the Fourteenth Amendment to the Constitution of the United States and are therefore null and void.

The amount in controversy in this suit exceeds the sum or value of Three Thousand Dollars ($3,000), exclusive of interest and costs.

IV.

The Public Service Commission, and its predecessor exercising like powers, acting under the authority vested in them by the Public Service Commissions Laws of the State of New York, have heretofore made the following orders prescribing the maximum rates for telephone exchange service to be charged by plaintiff in The City of New York:

An order dated March 30, 1915, effective July 1, 1915, establishing such maximum rates for the period of three years and thereafter until the further order of the Commission. A copy of said order is hereto attached, marked "Exhibit A." The rates prescribed
10 by said order were put into effect by plaintiff in The City of New York on July 1, 1915, and became and remained the lawful rates until October 1, 1919;

An order dated September 16, 1919, effective October 1, 1919, modifying said previous order of March 30, 1915, by reducing by 8% the maximum rates therein prescribed, to remain in effect for a period of one year, and thereafter until the further order of the Commission. A copy of said order is hereto attached, marked "Exhibit B." In compliance with this order the plaintiff reduced its said rates in The City of New York by 8% and the maximum rates so prescribed became and remained the lawful rates until April 1, 1921;

An order dated March 17, 1921, effective April 1, 1921, whereby the then Public Service Commission consented to an increase in the maximum rates, and further modified the said order of March 30, 1915, by eliminating the 8% reduction provided for in the order of September 16, 1919, and by the addition after such elimination of 20% to all of the rates determined and fixed by said order of March 30, 1915. A copy of said order is hereto attached, marked "Exhibit C." Plaintiff put said rates into effect in the City of New York on April 1, 1921, and they became and remained the lawful rates until July 1, 1921;

In and by said order of March 17, 1921, said Public Service Commission found that plaintiff had been obliged to make substantial increases in the salaries and wages of its employees in order to restore and preserve the effectiveness of the service; that these increases had been made with the approval and at the suggestion of the Commission; and that, because of such increases and certain other changed conditions adding to the cost of operation, plaintiff had for some time been unable to earn its operating expenses under the maximum rates fixed by said order of September 16, 1919, and would
11 suffer serious damage if these rates were continued in force;

An order dated June 16, 1921, effective July 1, 1921, further modifying the maximum rates prescribed by the order of March 30, 1915, by eliminating the addition of 20% provided for in the order of March 17, 1921, and substituting an addition of 10%;

only. A copy of said order is hereto attached, marked "Exhibit D." Plaintiff put said rates into effect in The City of New York on July 1, 1921, and they became and have remained the lawful rates up to this time;

An order dated March 3, 1922, effective April 1, 1922, which is one of the two orders herein complained of, further modifying the maximum rates prescribed by said order of March 30, 1915, by eliminating the addition of 10% provided for in the order of June 16, 1921, and substituting an addition of 5% only. A copy of said order is hereto attached, marked "Exhibit E."

V.

In the cities, towns and villages in the State of New York outside of the City of New York the rates for telephone exchange service now being charged by plaintiff are, with certain minor exceptions, rates which were duly filed by plaintiff in the office of the Public Service Commission, as provided by law, and which became effective on September 1, 1920, and said rates, with the minor exceptions above referred to, have been continuously in effect since September 1, 1920, up to this time. Referring specifically to the City of Buffalo, the rates so filed and put into effect on September 1st, 1920, were continued in effect only until November 1, 1921, when slightly lower rates were prescribed by an order of the Public Service Commission dated October 27, 1921, and these lower rates have
12 been in effect in the City of Buffalo since said order became effective and up to this time. The rates now in effect and referred to in this paragraph, including those for the City of Buffalo, are higher than the rates in effect for a considerable period of time prior to September 1, 1920.

By its order dated March 3, 1922, effective April 1, 1922, a copy of which is hereto attached, marked Exhibit F, which is one of the two orders herein complained of, the Public Service Commission has prescribed the rates for telephone service in the State of New York.

VI.

That the plaintiff's existing rates for intrastate toll service within the State of New York have been continuously in effect since prior to January 1, 1919. The said orders of March 3, 1922, Exhibits E and F hereto, made certain specific reductions in the rates to be charged by the plaintiff for its telephone exchange service in the State of New York, and subject to these reductions continued in effect as the only lawful rates which the plaintiff could charge for its telephone service within the State of New York the rates that were in existence at the date of the said orders, including the toll rates above mentioned.

VII.

The cost to plaintiff of its property in the State of New York now being used or useful in furnishing its intrastate telephone service

to the public and exclusively devoted to the rendition of that service was, as of January 31st, 1922, the sum of $247,435,923, and is now somewhat in excess of said amount on account of net addi-
13 tions made to the said property in the meantime. The present cost of reproduction of said property, as it existed on January 31st, 1922, is the sum of $373,000,000. The present fair and reasonable value of said property is in excess of the sum of $323,000,000.

The foregoing statements as to the cost to plaintiff of said property include nothing on account of the item of franchises or the item known as going concern value, but said latter item has been considered in determining the present cost of reproduction and present fair and reasonable value of said property.

VIII.

Plaintiff's telephone business in the State of New York has been conducted efficiently and economically during all the times herein referred to.

Plaintiff's net earnings derived from said intrastate telephone business within the State of New York, stated in rate per cent annual return upon the cost of the property used or useful in furnishing said service, and exclusively devoted to the rendition thereof, during each of the periods stated, have been as follows:

For the year 1919	5.72%
For the year 1920	1.37%
For the 1st quarter of the year 1921	1.29%
For the 2nd quarter of the year 1921	6.01%
For the last half of the year 1921	3.41%
For the year 1921	3.55%
For the month of January, 1922	3.52%

At all of the times aforesaid, the fair and reasonable value of said property has been an amount substantially in excess of its cost.

14

IX.

The fair annual return which the plaintiff is entitled to earn under rates imposed upon it by public authority is an amount equal to not less than 8% of the fair and reasonable value of its property used or useful in the rendition of the service covered by the rates in question.

X.

That the rates of the plaintiff in the State of New York established and enforced as herein set out, during the years 1919, 1920, 1921 and the month of January, 1922, were not compensatory and were less than just and reasonable rates; that the reductions made by the said orders, Exhibits E and F hereto, were in exchange rates, which rates afford to the plaintiff more than 80% of its total revenue from its said telephone business.

That the amounts by which the net revenues derived by the company from its intrastate telephone business within the State of New York were less than 8% of the cost of the property used or useful in, and exclusively devoted to, the rendition of plaintiff's intrastate telephone service within the said State were, for the year 1919, $4,061,182; for the year 1920, $13,257,099; for the first quarter of the year 1921 (upon an annual basis), $14,675,096; for the second quarter of the year 1921 (annual basis), $4,517,900; and for the last half of the year 1921 (annual basis), $10,934,022; and for the month of January, 1922 (annual basis), $11,034,145.

XI.

That the rates prescribed by the said orders here complained of, being Exhibits E and F hereto attached, do not and will not afford the plaintiff a fair return upon the fair and reasonable value at the time of use of its property, used or useful in, and exclusively devoted to, the service on account of which the said rates are established but are confiscatory in effect; the orders aforesaid and each of them are, therefore, null and void and the same, and each of them, if enforced would deprive plaintiff of its property without due process of law and deny to plaintiff the equal protection of the laws in violation of its rights under the provisions of the Fourteenth Amendment to the Constitution of the United States.

If said orders complained of are enforced and plaintiff is compelled to charge the rates therein prescribed and if plaintiff shall practice all reasonable economies consistent with adequate and efficient service to the public, the financial results will be as follows: Plaintiff will be prevented from earning any return in excess of 2.56% per annum upon the cost of its said telephone property in the State of New York and from earning any return in excess of 1.96% per annum upon the fair and reasonable value of said property.

XII.

The said order, Exhibit E hereto attached, in terms requires the plaintiff to file with the said Public Service Commission a bond or undertaking, with the American Telephone and Telegraph Company as surety, to be approved as to form and manner of execution by said Commission, providing for the repayment to each and every subscriber of all sums paid for service on and after April 1, 1922, in excess of such rates or charges as may be finally fixed by said Commission therefor.

That said provision of the said order is void because in excess of the authority conferred by law upon the said commission and, further, in that it deprives the plaintiff of an opportunity to have a judicial determination as to the legality of the rates finally prescribed by the commission by requiring the plaintiff to make such repayments, whether said rates be finally sustained as legal or not; and said order therefore on this account seeks to deprive the plaintiff of its property without due process of law and to

deny to the plaintiff the equal protection of the laws under the fourteenth amendment of the constitution of the United States, and is for these reasons null and void.

XIII.

Unless the defendants are restrained and enjoined as herein prayed, they will, as plaintiff believes and so alleges, attempt to compel plaintiff to comply with said orders of March 3, 1922, and to enforce the penalties prescribed by the laws of the State of New York, and plaintiff, its directors, officers, agents nad employees will be deterred and prevented by the threat of said penalties from charging lawful rates on and after April 1, 1922, and from charging any rates other than the rates prescribed by said orders, and thereby plaintiff will be forced to submit to the confiscation of its property without due process of law and in violation of its rights under the Constitution of the United States as hereinbefore alleged and will be subjected to great and irreparable loss and damage.

Unless the defendants are restrained and enjoined as herein prayed, plaintiff's subscribers will, as plaintiff believe and so alleges, be induced and caused to resist and refuse payment of any rates other than those prescribed in said orders. The present number of plaintiff's subscribers in the State of New York is more than 787,000, and the present average monthly bill rendered to them on account of exchange service is less than $8. Because of the nature of
17 the business of the plaintiff and the fact that the amounts due monthly from its subscribers for telephone exchange service are generally small, it is impracticable for plaintiff to enforce collection thereof by actions at law. Plaintiff has no practical way to enforce collection of its rates and charges except by cutting off and refusing service for default in payment of its bills rendered monthly therefor, and its subscribers will, as plaintiff believes and so alleges, institute large numbers of suits in various jurisdictions throughout the State of New York to restrain plaintiff from cutting off and denying service for such nonpayment of bills, and for damages, and plaintiff will thereby be subjected to an endless multiplicity of suits.

That the issues which would be presented in each such suit are presented, and should and will be decided, in this action.

Plaintiff has no plain, speedy or adequate remedy at law.

Wherefore plaintiff prays:

1st. That the rates prescribed in said orders of March 3, 1922 (Exhibit E and Exhibit F, attached hereto), be decreed to be confiscatory, in violation of the Constitution of the United States, and the orders imposing the same to be void;

2nd. That defendants and each of them and all other persons be temporarily and permanently restrained and enjoined from any attempt to compel the plaintiff, its officers, agents and employees to observe or put in force on April 1, 1922, or to observe or keep in

force thereafter, the rates for telephone service prescribed by said orders of March 3, 1922, or either of said orders;

3rd. That the defendants and each of them and all other persons be temporarily and permanently restrained and enjoined from
18 taking any steps or proceedings against the plaintiff, its officers, agents or employees to enforce any penalties or any other remedy for disregarding the rates prescribed by said orders or either of them;

4th. That the plaintiff have such other and further relief as may be just and equitable in the premises.

May it please your Honors to grant unto the plaintiff a writ of subpœna of the United States of America issuing out of and under the seal of this Honorable Court, directed to the said defendants, William A. Prendergast, William R. Pooley, Charles Van Voorhis, Oliver C. Semple, and Charles G. Blakeslee, the persons constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission; and Charles D. Newton, Attorney General of the State of New York, commanding them and each of them on a day certain to be named therein, and under a certain penalty, to be and appear before this Honorable Court then and there to answer, but not under oath, answer under oath being hereby expressly waived, all and singular the premises and to perform and abide by such orders, direction or decree as may be made against them in the premises, and that pending the final hearing of this cause a temporary restraining order may be issued as above prayed.

And the plaintiff will ever pray.

NEW YORK TELEPHONE COMPANY,
By CHARLES T. RUSSELL,
STETSON, JENNINGS & RUSSELL,
Its Solicitors.

JOHN L. SWAYZE,
JOHN W. DAVIS,
Of Counsel for Plaintiff.

19 UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

On this 29th day of March, 1922, before me personally appeared Howard F. Thurber, who, being by me first duly sworn, deposes and says that he is President of the New York Telephone Company, plaintiff herein; that he has read the foregoing Bill of Complaint by him subscribed and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

H. F. THURBER.

Subscribed and sworn to before me this 29th day of March, 1922.
[SEAL.] LINCOLN JONES,
Notary Public, Kings Co., No. 38.

Cert. Filed in N. Y. Co. No. 66.

20 EXHIBIT A.

State of New York,

Public Service Commission,

Second District.

At a Session of the Public Service Commission, Second District, Held in the City of Albany on the 30th Day of March, 1915.

Present:

Seymour Van Santvoord,
Chairman;
Martin S. Decker,
Devoe P. Hodson,
Wm. Temple Emmet,
Frank Irvine,
Commissioners.

In the Matter of Investigation of Rates and Charges for Service Rendered by THE NEW YORK TELEPHONE COMPANY Within the City of New York (Case No. 4089).

This case having been heard upon testimony for complainants, and testimony as directed by the Commission in relation to the cost and the reproduction cost of repondent's property devoted to public use within the City of New York; and the Commission having heretofore stated, upon the record so made, that its estimate of the value of respondent's said property for rate making purposes in this case and at this time is the sum of $82,000,000, to
21 which is to be added the cost of property improvements between June 30, 1914, and December 31, 1914, amounting to $1,796,685; that the respondent is entitled on present consideration to a return of 8 per cent upon such property value; that there shall be allowed as reduction from telephone operating revenue for reduced rates now to be ordered by the Commission the sum of $3,000,000, and that the said rate of return equal to 8 per cent is allowed upon consideration that respondent's operating income from its said property in New York city for the year ended December 31, 1914, after deducting all proper expenses, taxes, rents, and other proper charges, shall be taken as at least $10,027,445.33. Said rate of return is also based upon consideration of respondent's 8 per cent dividends and surplus account, the fact that New York city by reason of its large and dense population constitutes respondent's

most profitable field of operation, and the further fact that respondent's long distance toll service as maintained has a special value to subscribers and the public generally in New York city. And respondent having accepted the foregoing valuation, rate of return, and reduction of revenue, by statement of its counsel in open hearing, and having filed with the Commission a proposed schedule of reduced rates; and the Commission having thereupon taken the record of the case as so made under advisement, and the Commission having determined that said proposed schedule of rates should be amended by changes causing further reductions in favor of the public; and the Commission having estimated, after due and careful consideration, that the said proposed schedule of rates as so amended will cause a present reduction of revenue to respondent of $2,943,000, thus leaving a balance of $57,000 to cover omissions and errors, and making a total present reduction of $3,000,000, over and above the 10 per cent reduction already made by respondent during the pendency of this proceeding estimated by respondent at a sum over $2,000,000. The Commission does now hereby prescribe as follows:

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Zones.

It is Ordered: 1. The message rates of the respondent shall be established as for ten (10) Zones, described as follows, to wit:

Zone 1. Manhattan below 110th Street west and 103rd Street east; also Blackwells, Ellis, Liberty, and Governors Islands.

Zone 2. Remainder of Manhattan Island and the lower Bronx, including the central office districts of Harlem, Cathedral, Morningside, Audubon, Fordham, Tremont, Intervale, Marble, and Melrose; also Randalls and Wards Islands.

Zone 3. Remainder of the Bronx, including the central office districts of Westchester, City Island, Williamsbridge, Woodlawn, and Kingsbridge.

Zone 4. Upper Brooklyn, including the central office districts of Greenpoint, Stagg, Williamsburg, Bushwick, Main Prospect, Bedford, Decatur, East New York, Cypress, Hamilton, South, Sunset, Borough Park, and Flatbush; Astoria and Hunters Point.

Zone 5. Lower Brooklyn, including the central office districts of Bay Ridge, Bath Beach, Midwood, Coney Island, and Canarsie; also Barren Island.

Zone 6. The central office districts of Bayside, Newtown, Flushing, and Forest Hills.

Zone 7. The central office districts of Richmond Hill, Jamaica, Hollis, and Springfield.

Zone 8. The central office districts of Far Rockaway and Hammels.

23 Zone 9. The central office districts of West New Brighton, Tompkinsville, and New Dorp in the Borough of Richmond.

Zone 10. The central office district of Tottenville in the Borough of Richmond.

Subscribers' Individual Station Rates.

Zone 1.

2. The schedule of maximum rates for telephone service to subscribers' individual stations within Zone 1, with the local service area therefor, shall be as follows, to wit:

	Business and residence.		Residence only.		
Local messages.	Individual line.	Rate of advance.	2-party line.	Rate of advance.	Excess rate.
720	....	....	$36	5c.	5c.
800	$40	5c.	....	....	5c.
840	42	5c.	42	5c.	5c.
1020	51	5c.	51	5c.	5c.
1200	60	4c.	....	....	5c.
1500	72	4c.	....	....	5c.
1800	84	4c.	....	....	5c.
2100	96	4c.	....	....	5c.
2400	108	3c.	....	....	4c.
2700	117	3c.	....	....	4c.
3000	126	3c.	....	....	4c.
3300	135	3c.	....	....	4c.
3600	144	2½c.	....	....	3c.
3900	151.50	2½c.	....	....	3c.
4200	159	2½c.	....	....	3c.
4500	166.50	2½c.	....	....	3c.
4800	174	2½c.	....	....	3c.

Extension stations, $6 each. Auxiliary line and station, $27.

Additional local messages contracted for in advance in lots of 300, 2½ cents each.

Additional local messages not contracted for in advance, 3 cents each.

The local service area for Zone 1 shall include Zones 1, 2, 3, 4, and 5.

24 Zone 2.

3. The schedule of maximum rates for telephone service to subscribers's individual stations within Zone 2, with the local service area therefor, shall be as follows, to wit:

	Business and residence.		Residence only.		Residence only.		
Local messages.	Individual annual rate.	Rate of advance.	2-party annual rate.	Rate of advance.	4-party annual rate.	Rate of advance.	Excess rate.
600	....	....	....	....	$30	5c.	5c.
720	....	....	$36	5c.	36	5c.	5c.
800	$40	5c.	....	....	....	....	5c.
840	42	5c.	42	5c.	42	5c.	5c.
1020	51	5c.	51	5c.	51	5c.	5c.
1200	60	4c.	....	....	....	....	5c.
1500	72	4c.	....	....	....	....	5c.
1800	84	4c.	4c.	....	....	....	5c.
2100	96	4c.	....	....	....	....	4c.
2400	108	3c.	....	....	....	....	4c.
2700	117	3c.	....	....	....	....	4c.
3000	126	3c.	....	....	....	....	4c.
3300	135	3c.	....	....	....	....	3c.
3600	144	2½c.	....	....	....	....	3c.
3900	151.50	2½c.	....	....	....	....	3c.
4200	159	2½c.	....	....	....	....	3c.
4500	166.50	2½c.	....	....	....	....	3c.
4800	174	2½c.	....	....	....	....	3c.

Extension stations, $6 each. Auxiliary line and station, $27.

Additional local messages contracted for in advance in lots of 300, 2½ cents each.

Additional local messages not contracted for in advance, 3 cents each.

The local service area for Zone 2 shall include Zones 1, 2, 3, and 4.

25

Zones 4 and 5.

4. The schedule of maximum rates for telephone service to subscribers' individual stations within Zones 4 and 5, with the local service areas therefor, shall be as follows, to wit:

	Business and residence.		Residence only.		Residence only.		
Local messages.	Individual line.	Rate of advance.	2-party line.	Rate of advance.	4-party line.	Rate of advance.	Excess rate.
600	....	....	....	....	$30	5c.	5c.
720	....	....	$36	5c.	36	5c.	5c.
800	$40	5c.	....	....	....	....	5c.
840	42	5c.	42	5c.	42	5c.	5c.
1020	51	5c.	51	5c.	51	5c.	5c.
1200	60	4c.	....	....	....	....	5c.
1500	72	4c.	....	....	....	....	5c.
1800	84	4c.	....	....	....	....	5c.
2100	96	4c.	....	....	....	....	5c.
2400	108	3c.	....	....	....	....	4c.
2700	117	3c.	....	....	....	....	4c.
3000	126	3c.	....	....	....	....	4c.
3300	135	3c.	....	....	....	....	4c.
3600	144	2½c.	....	....	....	....	3c.
3900	151.50	2½c.	....	....	....	....	3c.
4200	159	2½c.	....	....	....	....	3c.
4500	166.50	2½c.	....	....	....	....	3c.
4800	174	2½c.	....	....	....	....	3c.

Extension stations, $6 each. Auxiliary line and station, $27.

Additional local messages contracted for in advance in lots of 300, 2½ cents each.

Additional local messages not contracted for in advance, 3 cents each.

The local service area for Zone 4 shall include Zones 1, 2, 4, 5, 6, and 7.

The local service area for Zone 5 shall includes Zones 1, 4, 5, 6, 7, and 8.

26 Zones 3, 6, 7, and 8.

5. The schedule of maximum rates for telephone service to subscribers' individual stations within Zones 3, 6, 7, and 8, with the local service areas therefor, shall be as follows, to wit:

Local messages.	Business and residence. Individual line.	Rate of advance.	Excess rate.
720	$36	5c.	5c.
900	45	4c.	5c.
1,200	57	4c.	5c.
1,500	69	4c.	5c.
1,800	81	4c.	5c.
2,100	93	3c.	4c.
2,400	102	3c.	4c.
2,700	111	3c.	4c.
3,000	120	2–1/2c.	3c.
3,300	127.50	2–1/2c.	3c.
3,600	135	2–1/2c.	3c.
3,900	142.50	2–1/2c.	3c.
4,200	150	2–1/2c.	3c.
4,500	157.50	2–1/2c.	3c.
4,800	165	2–1/2c.	3c.

Extension stations, $6 each. Auxiliary line and station, $27.

Additional local messages contracted for in advance in lots of 300, 2½ cents each.

Additional local messages not contracted for in advance, 3 cents each.

The local service area for Zone 3 shall include Zones 1, 2, and 3.

The local service area for Zone 6 shall include Zones 4, 5, 6, and 7.

The local service area for Zone 7 shall include Zones 4, 5, 6, 7, and 8.

The local service area for Zone 8 shall include Zones 5, 7, and 8.

27 Zones 9 and 10.

6. The schedule of maximum rates for telephone service to subscribers' individual stations within Zones 9 and 10, with the local service areas therefor, shall be as follows, to wit:

Local messages.	Business and residence. Individual line.	Rate of advance.	Excess rate.
720	$36	5c.	5c.
900	45	2-1/2c.	3c.
1,200	52.50	2-1/2c.	3c.
1,500	60	2-1/2c.	3c.
1,800	67.50	2-1/2c.	3c.
2,100	75	2-1/2c.	3c.
2,400	82.50	2-1/2c.	3c.
2,700	90	2-1/2c.	3c.
3,000	97.50	2-1/2c.	3c.
3,300	105	2-1/2c.	3c.
3,600	112.50	2-1/2c.	3c.

Extension stations, $6 each. Auxiliary line and station, $24.

Additional local messages contracted for in advance in lots of 300, 2-1/2 cents each.

Additional local messages not contracted for in advance, 3 cents each.

The local service area shall include Zones 9 and 10.

Private Branch Exchange Rates.

Zones 1, 2, 3, 4, 5, 6, 7, and 8.

7. The schedule of maximum rates for subscribers' private branch exchange telephone service within Zones 1, 2, 3, 4, 5, 6, 7, and 8, with the same local service areas as herein provided for said Zones under the individual station message schedules respectively, shall be as follows, to wit:

Minimum equipment consisting of monitor switchboard (limited to 7 stations and 3 trunks) 2 stations, one trunk, and 2,400 local messages per annum	$126.00
Same as above, with cord switchboard and operating set (limited to 30 station drops) in place of monitor board	132.00
Stations in connection with above switchboards:	
First 10, each	6.00
Second 10, each	4.80
Above 20, each	3.60
Additional working drops in switchboards having more than 30 station drops, each station drop	1.20
Additional trunks, each	24.00
Additional local messages when contracted for in advance in blocks of 300, each	.02½
Additional local messages not contracted for in advance, each	.03

Zones 9 and 10.

8. The schedule of maximum rates for subscribers' private branch exchange telephone service within Zones 9 and 10, with local service area including Zones 9 and 10, shall be as follows, to wit:

Minimum equipment consisting of monitor switchboard (limited to 7 stations and 3 trunks) 2 stations, one trunk, and 2,400 local messages per annum	$120.00
Same as above, with cord switchboard and operating set (limited to 30 station drops) in place of monitor board	126.00
Stations in connection with above switchboards:	
First 10, each	6.00
Second 10, each	4.80
Above 20, each	3.60
Additional working drops in switchboards having more than 30 station drops, each station drop	1.20
Additional trunks, each	24.00
Additional local messages when contracted for in advance in blocks of 300, each	.02½
Additional local messages not contracted for in advance, each	.03

29 *Toll Rates.*

9. The schedule of maximum toll rates between the Zones shall be those shown in the following table, to wit:

Subscribers' Toll Rates.

Zones.	1	2	3	4	5	6	7	8	9	10
1	L									
2	L	L								
3	L	L	L							
4	L	L	5c.	L						
5	L	5c.	10c.	L	L					
6	5c.	5c.	5c.	L	L	L				
7	5c.	5c.	10c.	L	L	L	L			
8	5c.	10c.	10c.	5c.	L	5c.	L	L		
9	5c.	10c.	10c.	5c.	5c.	10c.	10c.	10c.	L	
10	10c.	10c.	10c.	10c.	10c.	10c.	10c.	10c.	L	L

"L" indicates "local" for message rate-subscribers.

Where the subscriber's toll rate is L, the Public Telephone toll rate shall be 5 cents.

Where the subscriber's toll rate is 5 cents, the maximum Public Telephone toll rate shall be 10 cents.

Where the subscriber's toll rate is 10 cents, the maximum Public Telephone toll rate shall be 10 cents.

10. All flat rates and flat rate service within the city of New York now provided for in respondent's tariffs on file with the Commission as applying to said city of New York shall remain in force and effect. The toll rate between any such flat rate local area and other points within New York city shall not exceed 5 cents, except where the subscriber's toll rate for message service is 10 cents, and in such case the 10 cent toll rate will apply.

11. Except as changed by this order, respondent's present tariff schedule regulations on file with the Commission applying to the services affected by this order are continued in force.

12. The rates for telephone service herein specified shall become effective July 1, 1915, and shall remain in force for a period of three years and thereafter until the further order of the Commission.

30 13. The respondent, New York Telephone Company, shall file with this Commission its notice concerning acceptance of this order, under section 23 of the Public Service Commissions Law, within ten days after receipt of a copy hereof.

By the Commission.

(Signed) FRANK H. MOTT,
[SEAL.] *Secretary.*

EXHIBIT B.

State of New York,

Public Service Commission,

Second District.

At a Session of the Public Service Commission, Second District, Held in the City of Albany on the 16th Day of September, 1919.

Present:

Charles B. Hill, Chairman;
Frank Irvine,
John A. Barhite,
Thomas F. Fennell,
Joseph A. Kellogg,
Commissioners.

In the Matter of Investigation of Rates and Charges for Service Rendered by THE NEW YORK TELEPHONE COMPANY Within the City of New York [Case No. 6974].

Heretofore and on the 30th day of March, 1915, this Commission, by order duly made on that day, prescribed a schedule or
31 schedules of exchange rates and subscribers' toll rates between zones, all within the city of New York, to become effective July 1, 1915, and to remain in force for a period of three years and until the further order of the Commission. Said order was duly accepted in writing by the company, and the rates therein ordered and prescribed were made effective July 1, 1915, as therein directed, and ever since have been and still are in force and effect.

On August 1, 1919, the Commission took under consideration the justness and reasonableness of the rates so prescribed and in effect, and by resolution duly adopted on the 20th day of August, 1919, of its own motion initiated an investigation as to the justness and reasonableness of the exchange rates and subscribers' toll rates between zones of said company for its telephone service within said city of New York, and gave public hearings thereon at its office in the city of New York on the 28th day of August and the 4th day of September, 1919, at which the company was represented by counsel; and the City of New York was represented by Mr. William P. Burr, Corporation Counsel, and Mr. Robert L. Stanton, Assistant Corporation Counsel; and appearances were also made by Mr. S. C. Mead, Secretary, for the Merchants' Association of New York; Hon. James A. Foley for himself; Hon. Milo R. Maltbie for the New York World; Mr. M. H. Winkler for himself; Mr. Stewart Brown for the United Real Estate Owners' Association; and Messrs. Mark Goldberg and Edward F. Healy.

At the final hearing, said New York Telephone Company proposed that the investigation be deferred until on or after the 1st

day of October, 1920, upon condition that an order should be entered, with the company's consent, without further investigation or inquiry at this time, reducing certain of the rates now in
32 effect, such reduced rates to become effective as of October 1, 1919, and to remain in effect for the period of one year from that date, and thereafter until the further order of the Commission; and after due deliberation had, the Commission being of opinion that it is to the best interests of the telephone subscribers affected and of the company that said proposition be accepted, now, therefore, the Commission does hereby prescribe as follows:

It is Ordered: That the said order of March 30, 1915, be and is hereby modified as follows:

1. The rates and charges specified in ordering clauses 1 to 8 inclusive are reduced 8 per cent, to be deducted from monthly bills to subscribers.

2. In addition to the foregoing, the rates and charges now on file for (*a*) Flat rate services; (*b*) Intercommunicating systems; (*c*) Mileage (limited to extension, tie, foreign, submarine, and exchange mileage within the local service area); (*d*) Miscellaneous (that is, service stations, listings, supplemental equipment, special equipment, semi-public telephones, and any other rates and charges the revenue from which is credited to Account 500 as provided in the Uniform System of Accounts prescribed by this Commission); are likewise reduced 8 per cent, to be deducted from monthly bills to subscribers.

But this ordering clause does not include or affect installation, moving, or service connection charges.

3. The maximum subscriber toll rates between zones as specified in ordering clauses 9 and 10 shall not exceed five cents.

4. The reductions in rates and charges above prescribed shall become effective October 1, 1919, and shall remain in force for
33 a period of one year, and thereafter until the further order of the Commission, and schedules stating such reductions shall be published and filed on not less than five days' notice to the public and the Commission, such schedules to bear notation, "Issued on five days' notice to the public and the Commission, under order of the Public Service Commission, Second District, State of New York, of date September 16, 1919, in case No. 6974."

5. The respondent, New York Telephone Company, shall file with this Commission its notice concerning acceptance of this order, under section 23 of the Public Service Commissions Law, within ten days after receipt of a copy hereof.

By the Commission.

[SEAL.]

FRANCIS X. DISNEY,
Secretary.

34 EXHIBIT C.

State of New York,

Public Service Commission, Second District.

At a Session of the Public Service Commission, Second District, Held in the City of Albany on the 17th Day of March, 1921.

Present:

Charles B. Hill,
Chairman;
Frank Irvine,
John A. Barhite,
Joseph A. Kellogg,
George R. Van Namee,
Commissioners.

Case No. 7720.

Petition (or Complaint) of NEW YORK TELEPHONE COMPANY, under Subdivision 1, Section 97, Public Service Commissions Law, in Respect to Increasing Rates, Charges, Tolls, and Rentals to be Charged by it for Telephone Service in New York City.

In Case No. 4089 this Commission, by its order dated March 30, 1915, determined and fixed the rates and charges for service rendered by the New York Telephone Company, in the city of New York. Said order became effective July 1, 1915, and by its terms was to remain in force for a period of 3 years, and until the further order of the Commission.

35 On July 1, 1918, at the termination of said 3 year period, the property of the New York Telephone Company was in possession and under the control of the Postmaster General, which possession and control continued until August 1, 1919.

On August 20, 1919, this Commission continued its inquiry into the justness of the rates and charges of said New York Telephone Company, in the city of New York, and after an investigation and hearings, by its order of September 16, 1919, in Case No. 6974, modified and reduced the rates and charges determined and fixed by its previous order of March 30, 1915, by providing a reduction of 8 per cent, on all of such charges of said company for exchange telephone service, except charges for installation and moving, service connection charges, and except toll rates between zones for which a maximum charge of 5¢ per message was fixed.

The said order of September 16, 1919, provided that such rates so fixed should remain in force until October 1, 1920, and thereafter until furher order of the Commission.

After the entry of said last mentioned order it became necessary, in order to restore and preserve the effectiveness of the service of the

telephone company, that substantial increases should be made in the salaries and wages of the employees of said company, which increases, made with the approval and at the suggestion of this Commission, amount to approximately eleven million dollars ($11,000,000) per year.

It is claimed by the company that by reason of said increases in wages, and certain other changed conditions adding to the cost of operation, it has for some time been unable to earn its operating expenses from the revenues derived from the rates and charges fixed by said order of September 16, 1919.

36 The said company, on or about Aug. 25, 1920, continuing the proceedings above set forth, petitioned the Commission in this case for leave to put into effect, from and after October 1, 1920, certain new schedules of rates and charges for exchange telephone service in the city of New York, which would increase its annual revenues by some sixteen million ($16,000,000) dollars.

In and since the month of October 1920 various hearings have been held in said proceeding, and much testimony taken, and it is apparent that many more hearings must be held and considerable time elapsed before this proceeding can be closed and determined finally, and that said company may be damaged irreparably by the delay, unless it is afforded some relief at this time.

The said company has now, under and pursuant to the provisions of subdivision 1, section 97 of the Public Service Commissions Law, applied for the consent of this Commission to an immediate increase of rates and charges fixed and determined by said order of March 30, 1915, as modified by said order of September 16, 1919, pending the final determination of this proceeding.

It now appears to the satisfaction of this Commission, from the evidence before it in this proceeding, and also from its knowledge and information of the general condition of said company, derived from its various reports filed with this Commission according to law, and pursuant to order of this Commission, that the increase in wages of employees made effective as aforesaid since the order of this Commission of September 16, 1919, requires an additional annual expenditure of approximately eleven million dollars ($11,000,000) by said company, and to that extent decreases the income of said company from the amount anticipated it would receive from the rates established by said order of September 16, 1919, when said order was made by this Commission.

37 After due deliberation, it is the opinion of this Commission that it should at this time, in the exercise of its discretion, and in order to prevent serious damage to said company, consent to an immediate increase of the rates and charges determined and fixed by its said order of March 30, 1915, as modified by its said order of September 16, 1919, in such amount as will provide said company with additional annual revenue in an amount approximating such increases of wages to employees, of approximately eleven million dollars ($11,000,000) annually, such increase to be without effect in any way to the further conduct of and final

determination of this proceeding, and upon conditions safeguarding the interests of the subscribers of said company, in case it should be ultimately determined that the said company is not entitled to any increase of rates, or not entitled to an increase equal to said eleven million dollars ($11,000,000).

It further appears that by reason of said deduction at 8 per cent from the revenues affected thereby, by said order of September 16, 1919, the revenues of the company have been decreased to the extent of $3,160,000. per annum; and that in order to produce the added revenue on the same basis of eleven million dollars ($11,000,000), such reduction must be restored and in addition thereto approximately two and a half times as much added thereto to the rates established by the order of March 30, 1915, which were reduced by the order of September 16, 1919.

It is therefore ordered that pending the further continuation of this proceeding, and without affecting the final determination thereof, this Commission does hereby consent that, from and after April 1, 1921, and until its further order in the premises, the rates of said New York Telephone Company, for exchange telephone service, in the city of New York, as fixed and determined
38 by the said orders of this Commission, dated March 30, 1915 and September 16, 1919, be increased by the elimination of the 8 per cent specified in said last mentioned order, and by the addition after such elimination of 20 per cent to all of the rates and charges, for exchange telephone service and facilities, determined and fixed by said order of March 30, 1915, which were reduced 8 per cent by the said order of September 16, 1919.

Provided, however, that this consent shall not be effective until said New York Telephone Company shall file with this Commission a bond or undertaking, with the American Telephone & Telegraph Company as surety, approved as to form and manner of execution by this Commission, providing for the repayment to each and every subscriber in the city of New York, upon the final determination of this proceeding by this Commission, or by the Courts in the event that this proceeding is judicially reviewed, of any amounts paid by said subscribers, from and after April 1, 1921, in excess of the rates or charges which may be fixed upon in such final determination as reasonable rates or charges for the service furnished to such subscribers, with interest on such excess mounts at a rate of 6 per cent per annum from the respective date or dates of payment thereby to the company, to the date on which such rates and charges are fixed at a less amount than herein provided for.

Upon compliance with said condition said company may file upon five days' notice a tariff in accordance with the terms of this order.

By the Commission.

[SEAL.] (Signed) FRANCIS X. DISNEY,
Secretary.

39 EXHIBIT D.

At a Session of the Public Service Commission, State of New York, Held at the New York Office of the Commission, #49 Lafayette Street, New York City, on the 16th Day of June, 1921.

Present:

Hon. William A. Prendergast,
Chairman;
Hon. William R. Pooley,
Hon. Charles Van Voorhis,
Hon. Oliver C. Semple,
Hon. Charles G. Blakeslee,
Commissioners.

Case No. 7720.

Petition (or Complaint) of NEW YORK TELEPHONE COMPANY in Respect to Increasing Rates, Charges, Tolls, and Rentals to be Charged by it for Telephone Service in New York City.

On the 17th day of March, 1921, the Public Service Commission, Second District, by an order granted in this case, having modified the orders of the said Commission dated March 30, 1915, and September 16, 1919, respectively authorizing the said New York Telephone Company to increase its rate for exchange service in the City of New York by the elimination of the eight per cent (8%) deduction specified in the said order of September 16, 1919, and by the addition of twenty per cent (20%) to the rates for exchange service fixed by the said order of March 30, 1915;

And it appearing from statements submitted by the New York Telephone Company at the request of this Commission, that the income for the month of February, 1921, was in excess of ex-
40 penses in an amount of $38,821.92; that the income for the month of March 1921, was in execess of expenses in an amount of $128,208.24; that the income for the month of April 1921, was in excess of expenses in an amount of $1,006,009.42; said increase of income over expenses in April reflecting the increases granted in said order of March 17, 1921;

And it further appearing from the evidence taken in said hearings that the trend of operating and other expenses is gradually and generally downward;

And it appearing therefrom that said temporary rates established under said order of March 17, 1921, will result in an increase of net operating income, equivalent to an amount regarded by this Commission as more than a fair and adequate return upon the capital investment claimed herein by the Company; so that under all the circumstances of this case, this Commission is satisfied that the public interest requires a reduction in said temporary rates charged for telephone service by said New York Telephone Company, under

authority of said order of March 17, 1921; and that a temporary change in the rate charged by said New York Telephone Company under the order of the Commission dated September 16, 1919, is necessary for the purpose of providing adequate service and for the preservation of the property.

Now, therefore, upon the terms, conditions and safeguards hereinafter stated in this order, it is

Ordered: That the aforesaid order made and filed herein by the Public Service Commission, Second District, on the 17th day of March, 1921, be modified and that, pending the further continuation of this proceeding and without affecting the final determination thereof this Commission does hereby consent and authorizes that, from and after July 1, 1921, and until its further order in
41 the premises, the rates of the said New York Telephone Company for exchange telephone service in the City of New York, shall be temporarily determined by the elimination of the eight per cent (8%) deduction specified in the aforesaid order of the Public Service Commission, Second District, dated September 16, 1919, and by the addition, after such elimination, of ten per cent (10%) only, instead of twenty per cent (20%) as heretofore ordered on March 17, 1921, to the rates and charges for exchange telephone service and facilities determined and fixed by the aforesaid order of the Public Service Commission, Second District, dated March 30, 1915; without prejudice however, to the conditions and requirements set forth in the aforesaid order of March 17, 1921, as to the bond of the said New York Telephone Company and its surety, the American Telephone and Telegraph Company, and without prejudice to any obligations under said bond now in force to secure the repayment, with interest at six per cent (6%) to subscribers in the City of New York, of any amounts paid by said subscribers from and after April 1, 1921, under the aforesaid order of March 17, 1921; and upon condition that the New York Telephone Company shall repay to each and every subscriber, all sums paid for service from and after June 30, 1921, in excess of the rate or charges which may be fixed by a final determination herein by the Commission, or the rates or charges to be demanded, exacted or collected for service to any such subscriber; and

It is further ordered: That the said New York Telephone Company file with this Commission a bond or undertaking with the American Telephone and Telegraph Company as surety, approved as to form and manner of execution by this Commission, providing for the repayment to each and every subscriber of all sums paid for service from and after June 30, 1921, in excess of the rates or
42 charges which may be fixed by a final determination herein by this Commission of the rates or charges to be demanded, exacted or collected, by the said New York Telephone Company for service to any such subscriber.

By the Commission.

(Signed) FRANCIS E. ROBERTS,
Acting Secretary.

[SEAL.]

EXHIBIT E.

State of New York,

Public Service Commission.

At a Session of the Public Service Commission, State of New York, Held in the City of Albany, on the 3rd Day of March 1922.

Present:

William A. Prendergast,
Chairman,

William R. Pooley,
Charles Van Voorhis,
Oliver C. Semple,
Charles G. Blakeslee,
Commissioners.

Case No. 7720.

Petition or Complaint of NEW YORK TELEPHONE COMPANY in Respect to Increasing Rates, Charges, Tolls, and Rentals to be Charged by it for Telephone Service in New York City.

On the 16th day of June, 1921, the Commission made and filed its order whereby temporary decreases in rates of New York Telephone Company for exchange service in New York City were
43 authorized, effective July 1, 1921, pending a final determination of the rates to be thereafter demanded by the said company upon terms, conditions and safeguards as therein stated. Thereafter the Commission entered upon hearings as to rates, charges and rentals and the regulations and practices affecting the rates, charges and rentals of the said company within the State of New York; and it appearing now to the satisfaction of the Commission that public interest requires a further change in the rates, charges and rentals for telephone service charged by the said company within the City of New York; and the Commission having decided to authorize an immediate temporary decrease in the rates, charges or rentals established in and by said order of June 16, 1921, pending a final determination of the rates, charges or rentals to be thereafter demanded, exacted or collected by such corporation;

Now, therefore, upon the terms, conditions and safeguards hereinafter stated in this order, it is

Ordered: That the first ordering clause of said order of June 16, 1921, be and the same hereby is amended and modified to read as follows:

Ordered: That the aforesaid order made and filed herein by the Public Service Commission, Second District, on the 17th day of March, 1921, be modified and that, pending the further continuation

of this proceeding and without affecting the final determination thereof this Commission does hereby consent and authorize that, on and after April 1, 1922, and until its further order in the premises, the rates of the said New York Telephone Company for exchange telephone service in the City of New York, shall be temporarily determined by the elimination of the eight per cent (8%) de-
44 duction specified in the aforesaid order of the Public Service Commission, Second District, dated September 16, 1919, and by the addition, after such elimination, of five per cent (5%) only, instead of twenty per cent (20%), as heretofore ordered on March 17, 1921, to the rates and charges for exchange telephone service and facilities determined and fixed by the aforesaid order of the Public Service Commission, Second District, dated March 30, 1915; without prejudice however, to the conditions and requirements set forth in the aforesaid order of March 17, 1921, as to the bond of the said New York Telephone Company and its surety, The American Telephone and Telegraph Company, and without prejudice to any obligations under said bonds now in force to secure the repayment, with interest at six per cent (6%), to subscribers in the City of New York, of any amounts paid by said subscribers from and after April 1, 1921, under the aforesaid order of March 17, 1921; and upon condition that the New York Telephone Company shall repay to each and every subscriber, all sums paid for service from and after June 30, 1921, in excess of the rate or charges which may be fixed by a final determination herein by the Commission, of the rates or charges to be demanded, exacted or collected for service to any such subscriber;

It is further ordered: That this order shall be without prejudice to any obligation under the bond now in force to secure a repayment to each and every subscriber of all sums paid for service from and after June 30, 1921, in excess of the rate or charges which may be fixed by a final determination herein by the Commission which bond was filed pursuant to the requirements of said order
45 of June 16, 1921, by New York Telephone Company with American Telephone and Telegraph Company as surety.

It is further ordered: That the said New York Telephone Company file with this Commission a bond or undertaking with the American Telephone and Telegraph Company as surety, approved as to form and manner of execution by this Commission, providing for the repayment to each and every subscriber of all sums paid for service on and after April 1st, 1922, in excess of the rates or charges which may be fixed by a final determination herein by this Commission of the rates or charges to be demanded, exacted or collected by the said New York Telephone Company for service to any such subscriber.

By the Commission.

[SEAL.] (Signed) FRANCIS E. ROBERTS,
Secretary.

46

EXHIBIT F.

State of New York,

Public Service Commission.

At a Session of the Public Service Commission Held in the City of Albany on the 3rd Day of March, 1922.

Present:

William A. Prendergast,
Chairman;
William R. Pooley,
Charles Van Voorhis,
Oliver C. Semple,
Charles G. Blakeslee,
Commissioners.

Case No. 377.

In the Matter of the Hearings on Motion of the Commission as to Rates, Charges, and Rentals and the Regulations and Practices Affecting the Rates, Charges, and Rentals of THE NEW YORK TELEPHONE COMPANY.

The Public Service Commission having entered upon hearings as to rates, charges and rentals and the regulations and practices affecting the rates, charges and rentals of the New York Telephone Company within the State of New York;

And it appearing to the satisfaction of the Commission that public interest requires a change in the rates, charges and rentals for telephone service charged by the New York Telephone Company within the State of New York, temporarily and pending a final determination of the rates, charges and rentals to be thereafter demanded, exacted or collected by said New York Telephone Company;

47 Now, therefore, under the provisions of the Public Service Commission Law, it is

Ordered, (1) That all of the towns, cities and villages hereinafter named in which the said New York Telephone Company operates exchanges, and all of the telephone exchanges therein, are hereby for the purpose of this Order, and for the purposes of the temporary rates established by this Order, classified and divided into groups as in this Order, hereinafter stated, and that the rates, charges and rentals to be hereafter demanded, exacted, or collected by the said New York Telephone Company shall be as in this Order stated, all said rates, charges and rentals to take effect and be in force on and after April 1, 1922, and to remain in force and effect pending a final determination of the rates, charges and rentals to be thereafter demanded, exacted or collected by such New York Telephone Company, or until the further Order of this Commission. All rates,

charges and rentals applying to any and all other service furnished by said New York Telephone Company to be and remain as stated in the Company's schedule of rates, rentals and charges for service.

The grouping and classification of said towns, cities and villages, and the exchanges operated therein, and the temporary rates, charges or rentals to be demanded, exacted or collected therein, shall be as follows, and payable monthly in advance:

48 *Group I.*

Arkport.	Fabius.	Porters Corners.
Barker.	Greenwood Lake.	Selden.
Bliss.	Hermitage.	Sharon Springs.
Campbell.	Kendall.	Shokan.
Carmel.	Kent Cliff.	South Onondaga.
Cayuga.	Newfield.	South Salem.
Center Brunswick.	North Clove.	Stanfordville.
Cicero.	Osceola.	Varysburg.
Commack.	Owasco.	Waterport.
Elba.	Parish.	Woodstock.
Enfield Center.	Phœnicia.	Yorktown Heights.
Esopus.	Pleasant Valley.	

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$3.00
Residence " 1 " " "	2.25
Business " 4 " " "	2.25
Residence " 4 " " "	2.00
Rural Service:	
Business telephone	2.25
Residence "	2.00

Group II.

Alden.
Altamont.
Amagansett.
Amenia.
Angola.
Averill Park.
Avoca.
Bayport.
Bolton.
Brentwood.
Bridgehampton.
Camden.
Canaseraga.
Canisteo.
Castleton.
Central Islip.
Chatham.
Cleveland.
Clinton Corners.
Constantia.
Croton Falls.
Deposit.
Dover Plains.
*East Quogue.
East Syracuse.
Fayetteville.
Floral Park.
Forestville.
Garden.
Garrison.
Groton.
Highland Falls.
High Falls.
Holland.
Horseheads.
Hyde Park.
Interlaken.
Jonesville.
Lake George.
Lewiston.
Liverpool.
Mahopac.
Moravia.
Orchard Park.
Patterson.
Philmont.
Pine Hill.
Portville.
Ransomville.
Ronkonkoma.
Rosendale.
Sackett Harbor.
Sag Harbor.
Sempronius.
Shoreham.
Silver Creek.
Smithtown.
South Dayton.
Springville.
Trumansburg.
Tully.
Union Springs.
Valley Falls.
Voorhesville.
Warrensburg.
Water Mill.
Weedsport.
Wingdale.
Youngstown.

49 *Basic Area Rates.*

	Per month.
Business telephone, 1 party, unlimited service	$3.50
Residence " 1 " " "	2.50
Business " 4 " " "	2.75
Residence " 4 " " "	2.00
Rural Service:	
Business telephone	2.50
Residence "	2.00

NOTE.—In all Exchanges having more than one rate zone, the same rate differences now existing between zones shall apply.

*Correction as per Commission's letter dated 3/9/22.

Group III.

Akron.	Good Ground.	New Paltz.
Amityville.	Goshen.	North Collins.
Arcade.	Gowanda.	Northport.
Attica.	Greenport.	North Salem.
Baldwinsville.	Hamburg.	Orient.
Bath.	Hamilton.	Pawling.
Barneveld.	Hicksville.	Pearl River.
Bedford Village.	Highland.	Peconic.
Bellport.	Holley.	Port Jefferson.
Brewster.	Hoosick Falls.	Quogue.
Burnt Hills.	Islip.	Riverhead.
Canastota.	Jamesport.	Sayville.
Center Moriches.	Jordon.	Setauket.
Chappaqua.	Katonah.	Shelter Island.
Cherry Creek.	Kings Park.	Skaneateles.
Clarksville.	Liberty.	Southhold.
Clintondale.	Long Beach.	St. James.
Clinton.	*[Lydonville] †Lyndonville.	Stony Brook.
Cobleskill.	Marlboro.	*Wappingers Falls.
Cold Spring.	Massapequa.	Watkins.
Dolgeville.	Mattituck.	Westbury.
Easthampton.	Mexico.	West Hampton.
Eastport.	Middleport.	Williamsville.
Eden.	Millbrook.	Wilson.
Ellenville.	Milton.	Woodmere.
Farmingdale.	Montour Falls.	Yaphank.
*Fleischmanns.	Oakfield.	
Gasport.	Newfane.	

50 *Basic Area Rates.*

	Per month.
Business telephone, 1 party, unlimited service	$3.75
Residence " 1 " " "	2.75
Business " 2 " " "	3.35
Residence " 2 " " "	2.50
Business " 4 " " "	3.00
Residence " 4 " " "	2.10
Rural Service:	
Business telephone	2.75
Residence "	2.10

NOTE.—Two party line service may be furnished subscribers in the exchanges in this group at the option of the Company at a rate of not in excess of the one set forth.

NOTE.—In all Exchanges having more than one rate zone, the same rate differences now existing between zones shall apply.

*Corrections as per Commission's letter dated 3/7/22.
[†Erased in copy.]

Group IV.

Albion.	Greenwich.	Patchogue.
Babylon.	Hastings.	Penn Yan.
Ballston.	Haverstraw.	Piermont.
Barre Center.	Huntington.	*Pleasantville.
Bay Shore.	Lindenhurst.	Pt. Washington.
Beacon.	Manhasset.	Roslyn.
Blue Point.	Medina.	Saugerties.
Cattskill.	Mt. Kisco.	Schuylerville.
Cold Spring Harbor.	Nanuet.	Southampton.
Congers.	New City.	Spring Valley.
Derby.	New Hartford.	Suffern.
East Aurora.	Nyack.	Valley Stream.
Endicott.	Owego.	Whitesboro.
Great Neck.	Oyster Bay.	Ulster Park.

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$4.25
Residence " 1 " " "	3.00
Business " 2 " " "	3.65
Residence " 2 " " "	2.75
Business " 4 " " "	3.25
Residence " 4 " " "	2.25
Rural Service:	
Business telephone	3.00
Residence "	2.55

NOTE.—In all Exchanges having more than one rate zone, the same rate differences now existing between zones shall apply.

*Correction as per Commission's letter dated 3/20/22.

51 *Group V.*

Allegany.	Hornell.	*[Portchester.]
Batavia.	Hudson.	Port Chester.
Briarcliff.	Ilion.	Rockville Center.
Claverack.	Irvington.	Rome.
Corning.	Lancaster.	Rye.
Cortland.	Little Falls.	Salamanca.
Dobbs Ferry.	Lockport.	Saratoga Springs.
Dunkirk.	Lynbrook.	Seneca Falls.
Fayette.	Mamaroneck.	Sloatsburg.
Frankfort.	McGraw.	Tarrytown.
Freeport.	Mechanicsville.	*[Towanda.]
Garden City.	Olean.	Tonawanda.
Geneva.	Oneida.	Waterloo.
Glen Cove.	Park (New Rochelle)	Wanakah.
Hempstead.	Ossining.	Waverly.
Herkimer.	Oswego.	Wantagh.
Homer.	Peekskill.	

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service.....	$5.25
Residence " 1 " " "	3.25
Business " 2 " " "	4.25
Residence " 2 " " "	2.85
Business " 4 " " "	3.75
Residence " 4 " " "	2.35

Rural Service:

Business telephone.....	3.10
Residence "	2.35

NOTE.—Business 4 party line service may be furnished subscribers in the exchanges in this group at the option of the Company at a rate not in excess of the one set forth.

NOTE.—In all Exchanges having more than one rate zone, the same rate differences now existing between zones shall apply.

52 *Group VI.*

Amsterdam.	Kingston.
Argyle.	LaSalle.
Auburn	Newburgh.
Brookville.	Niagara Falls.
Elmira.	Poughkeepsie.
Elmsford.	Ramapo Hills.
Fort Edward.	Scarsdale.
Glens Falls.	Watertown.
Hudson Falls.	White Plains.
Kattskill Bay.	

*Corrections as per Commission's letter dated 3/7/22.
†Erased in copy.

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$6.25
Residence " 1 " " "	3.50
Business " 2 " " "	5.25
Residence " 2 " " "	3.00
Residence " 4 " " "	2.50

Rural Service:

Business telephone	3.25
Residence "	2.50

NOTE.—In all Exchanges having more than one rate zone, the same rate differences now existing between zones shall apply.

Group VII.

Binghamton.
Bronxville.
Hillcrest.
Johnson City.
Mt. Vernon.
Larchmont.
New Rochelle.
Oakwood.
Pelham.
Tuckahoe.
Yonkers.

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$7.00
Residence " 1 " " "	3.75
Business " 2 " " "	6.00
Residence " 2 " " "	3.25
Residence " 4 " " "	2.65

Rural Service:

Business telephone	3.40
Residence "	2.65

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Group VIII.

Cohoes.
North Troy.
Schenectady.
Troy.
Utica.
Waterford.
Watervliet.

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$8.00
Residence " 1 " " "	4.00
Business " 2 " " "	6.25
Residence " 2 " " "	3.40
Residence " 4 " " "	2.75
Rural Service:	
Business telephone	3.60
Residence "	2.75

Group IX.

Albany. {Main. East. West.}

Syracuse. {James. Warren. Montgomery.}

*Delmar.

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$8.50
Residence " 1 " " "	4.25
Business " 2 " " "	6.50
Residence " 2 " " "	3.50
Residence " 4 " " "	2.85
Rural Service:	
Business telephone	3.75
Residence "	2.85

*Corrections as per Commission's letter dated 3/7/22.

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Group X.

Buffalo.

Basic Area Rates.

	Per month.
Individual Line, Business and Residence*, Message:	
80 or less	$4.00
Next 120—each	.05
Next 50—each	.04
All over 250—each	.03
Residence telephone, 1 party, Individual line, unlimited	4.75
Residence " 2 " "	3.75
4 Party, Residence only*, Message:	
60 or less	2.75
Next 40—each	.04
All over 100—each	.03
Outside Area:	
4 Party Line, Business and Residence*, Message:	
70 or less	$3.25
Next 30—each	.04
All over 100—each	.03

Group XI.

New York City.

(Comprising the Boroughs of Manhattan, The Bronx, Brooklyn, Queens and Richmond.)

The rates for this group shall be as prescribed in the Order of March 3rd, 1922, in Case No. 7720, upon terms and conditions as therein set forth.

Special Group A.

Company's present rates for these exchanges will apply:

Bayside.	Solvay.
Blue Stores.	Syosset.
Ithaca.	Tuxedo.
Lycoming.	Wheatley Hills.
Prospect.	

55 Ordered: (2) This Order is made without prejudice to the conditions and requirements of any and all bonds heretofore given by the said New York Telephone Company in any and all proceedings involving rates, charges and rentals, applicable to any or all

*Corrections as per Commissioner's letter dated 3/7/22.

of the various exchanges listed herein, and without prejudice to any obligation of the New York Telephone Company, or its sureties, on any bonds heretofore given in any proceeding and now in force, to secure repayments to subscribers of sums paid for services under order therein of the former Public Service Commission, Second District, State of New York, or of this Commission, in excess of the rates, charges or rentals which may be fixed therein by final determination of the Commission as the rates, charges or rentals to be demanded, exacted or collected for service to any such subscribers.

Ordered: (3) It is further Ordered that the New York Telephone Company, and any and all municipalities affected by this Order, may apply to the Commission for a modification of the classifications hereinbefore made, by filing application, in writing, stating the reasons therefor, at the Office of the Commission at Albany, New York, on or before April 15th, 1922.

By the Commission.

[SEAL.] (Signed) FRANCIS E. ROBERTS,
Secretary.

56 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of James A. Stewart.

STATE OF NEW YORK,
County of New York, ss:

James A. Stewart, being duly sworn, says that he is the First Vice President and General Manager of the plaintiff, New York Telephone Company, and resides at East Orange, New Jersey. That he was graduated from the University of Pennsylvania in the year 1892 with the degree of Bachelor of Science and was given the degree of Mechanical Engineer by the same University in the year 1893. That he has been employed by the plaintiff and its predecessor corporation, the Metropolitan Telephone and Telegraph Company, for twenty-nine years continuously. That he was first employed as Engineer in the Engineering Department, was afterwards in the Plant Department, and subsequently became the head thereof. That on or about January 1, 1912, he became the General Manager of the plaintiff, and afterwards and on or about October 29, 1919, First Vice

President and General Manager thereof, which position he still holds. That ever since becoming General Manager he has had and still has general charge of all of the operating departments of the plaintiff.

57 That he is thoroughly familiar with all the branches of plaintiff's business and with its methods of conducting the same and with all its plant and property. That the plaintiff owns and operates telephone lines and exchanges and conducts a public telephone business in The City of New York and throughout fifty-nine of the sixty-two counties of the State of New York and in the twelve northern counties of the State of New Jersey and in the Town of Greenwich in the State of Connecticut. That plaintiff furnishes exchange service and also intrastate and interstate toll telephone service. That it has at the present time in its entire system 456 central offices or exchanges. That of said central offices 79 are within The City of New York; 291 within the State of New York in that part thereof which is outside of The City of New York, and 86 are located outside of the State of New York.

That the plaintiff owns in the State of New York 137 parcels of land and buildings which it acquired at an actual cost of more than $36,000,000. In addition to these buildings plaintiff has others in course of construction of a value of more than $1,500,000. That of said 137 parcels of land and buildings 65 are within The City of New York and 72 in that part of the State outside of The City of New York. That the plaintiff has in operation in the State of New York more than 5,000,000 miles of electrical wires, by far the greatest part of which are composed of copper, and more than 3,587,000 miles thereof are within The City of New York.

The plaintiff is now operating in its entire system upwards of 1,727,233 telephones, or as they are commonly referred to in the telephone business, "stations." That of said number of stations 1,011,014 are in The City of New York and 448,680 in that part of the State of New York which is outside of The City of New York, and the balance are located in the territory of the Company out-

58 side of the State of New York. That the number of stations operated by the plaintiff is growing continually, and the estimated growth in the number of stations during the year 1922 in the State of New York is upwards of 8% of the stations now in service, or, in other words, approximately 116,000 stations will be added to the plaintiff's system in that State during the year.

That the plaintiff has in the State of New York more than 836,000 accounts with subscribers and the average number of monthly bills which it has to send to subscribers on account of service furnished to them is in excess of 787,000; that of such number approximately 450,000 of the subscribers to whom such bills are sent are in The City of New York and approximately 337,000 in that part of the State of New York which is outside of The City of New York.

That at the time when deponent began his employment with the predecessor of the plaintiff, the Metropolitan Telephone and Telegraph Company, twenty-nine years ago, that Company had in operation in The City of New York less than 8,000 stations, and, as above

stated, plaintiff now has in operation in said City over 1,000,000 stations.

That the volume of telephone traffic handled by the plaintiff in the State of New York is indicated by the fact that originating messages (that is to say, messages sent from stations) during the year 1921 were as follows: local messages, 2,158,038,630; toll messages, 82,244,800; long distance messages, 6,513,392.

That the plant and property of the plaintiff is at all times kept in first-class condition by making currently all proper repairs and renewals, so that from an operation and service standpoint all of the plant and property in its entire system is at all times in a 100% condition.

That the business of the plaintiff requires large amounts
59 of new capital continually. That this is so because of the continual growth of the business and on account of its character. That as each new subscriber or user of the service is added to the system, it is necessary to install a new telephone, wiring and equipment, a copper circuit running from the place where the telephone station is located to the central office from which the telephone is served, and a separate location on the switchboard at such central office. That as the capacity of the switchboards of the plaintiff is filled up, it requires the installation of new switchboards, apparatus and equipment, the re-arrangement of central offices and the acquisition of additional real estate and the construction of new buildings, the total cost of which runs into great sums of money. That the actual expenditures made by the plaintiff for additional property and construction during the years 1920 and 1921 were as follows:

	1920.	1921.
Entire System	$35,394,000	$48,037,000
State of New York	29,950,000	40,790,000
City of New York	25,032,000	35,174,000

That the following amounts will be necessarily expended by the plaintiff for additional property and construction during the years 1922 and 1923:

	1922.	1923.
Entire System	$49,324,000	$50,000,000
State of New York	42,247,800	43,000,000
City of New York	36,436,600	37,000,000

That the amounts above stated do not include other substantial amounts which plaintiff has actually expended in the years 1920 and 1921 and will have to expend in the years 1922 and 1923 for miscellaneous general equipment and interest during construction.

That since becoming General Manager of the plaintiff
60 & 61 in the year 1912, one of deponent's chief duties has been to supervise and examine into the operating expenses of the plaintiff and he has made every effort during all of the time since that date to effect as many economies as possible and to keep the op-

erating expenses at as low a level as is consistent with the maintenance of the plant and the furnishing of good service. That in the opinion of deponent the operating expenses of the Company at the present time and during the past are and have been fair and reasonable.

JAMES A. STEWART.

Subscribed and sworn to before me this 29th day of March, 1922.
[SEAL.] LINCOLN JONES,
Notary Public, Kings Co., No. 38.
Cert. Filed in N. Y. Co. No. 66.

62 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of Jacob S. Wiley.

STATE OF NEW YORK,
County of New York, ss:

Jacob S. Wiley being duly sworn, deposes and says: That he resides at Summit, New Jersey. That he was first employed in the telephone business in the year 1892 by the New York and New Jersey Telephone Company, which corporation was at that time operating in the City of Brooklyn and elsewhere and was one of the predecessors of the plaintiff, and that he has been continuously employed by Bell telephone companies in accounting work since that time. That since December 1, 1912, he has been the chief accounting officer of the plaintiff with the title of General Auditor and has complete charge of all plaintiff's accounts and accounting systems and is thoroughly familiar with the same.

That the accounts of the plaintiff, the New York Telephone Company, are and have been since January 1, 1913, kept in accordance with accounting regulations prescribed by the Interstate Commerce Commission and adopted and approved by the Public Service
63 Commission, Second District, of the State of New York; that as so kept said accounts do not separate the portions of plaintiff's investment used in its toll service between intrastate and interstate, nor do they separate expense items relating to both said services. For the purposes of this affidavit the basis of apportionment shown by the affidavit of Andrew Sangster is adopted.

That the average cost of plaintiff's property as hereinafter stated

is made up from items taken from three accounts prescribed by the said regulations of the Interstate Commerce Commission, which are

Account No. 101, Fixed Capital.

Account No. 104, Construction Work in Progress.

Account No. 122, Supplies.

That the said account "Fixed Capital" includes the items making up the cost of plant in service; that the account "Construction Work in Progress" includes the items making up the cost of like plant in course of construction and intended to be put into service as soon as completed; and the account "Supplies" cover items of the character indicated by the title.

That the amounts in these accounts are continually changing and that the following statements are in each instance based upon the average in each of these accounts for the period covered by the statement in question.

That the variations for different periods in the items "Fixed Capital" and "Construction Work in Progress" are due to the fact that additions to the plant of the plaintiff company are constantly being built, which are treated as construction work in progress until the plant is put into service and which then become items to go into the account "Fixed Capital"; that the net additions to the "Fixed Capital" account on account of property put into service were for the year 1919 for the entire state of New York $11,018,113., for
64 the year 1920 $17,914,899., and for the year 1921 $20,757,258.; and that the net additions to the account "Construction Work in Progress," taking into account the deductions from it because of completed work added to the "Fixed Capital" account and the additions to it on account of new construction commenced, were for the year 1919 $804,351., for the year 1920 $10,666,983., and for the year 1921 $10,287,381.

The statements as to costs hereinafter set out contain nothing on account of franchises or on account of the item known as going concern value.

1919.

That the net return earned by the plaintiff through its telephone rates and the rendition of its intrastate telephone service in the State of New York during the year 1919 amounted to 5.72% of the cost of its property used or useful in and devoted solely to the rendition of the said service, including necessary working cash; that a statement showing said costs and the results of said operations for 1919 is as follows:

Average Cost of Property.

Average Fixed Capital	$170,007,955
Average Construction Work in Progress	1,672,202
Average Working Cash	4,016,514
Average Supplies	2,578,931
Total	$178,455,602

Telephone Revenues.

Exchange Service	$51,316,643
Toll Service	7,850,985
Miscellaneous	1,182,793
Total Telephone Revenue	$60,350,421

65 *Telephone Expenses.*

Current Maintenance	$7,300,481
Depreciation and Amortization	8,804,693
Traffic	17,106,123
Commercial	6,681,713
General and Miscellaneous	1,497,233
Uncollectible Operating Revenue	149,726
Taxes	3,806,552
Rent Expense and Deductions	1,919,307
Miscellaneous Deductions	310,093
Licensee Contract Expense	2,559,234
Total Telephone Expense	$50,135,155
Net Telephone Revenue	$10,215,266
Per cent Net Revenue	5.72%

1920.

That for the year 1920 the net return earned by the plaintiff through its intrastate telephone rates and the rendition of its telephone service in the State of New York amounted to 1.37% of the cost of its property used or useful in and devoted solely to the rendition of the said service, including necessary working cash; that as will appear from the statement which follows, the marked decrease in the net revenue from the said service during the year 1920 was due to large increases in operating expenses which increases were necessary in order to restore efficient service and were made largely at the suggestion and with the approval of the Public Service Commission of the State of New York; that a statement showing said cost and the results of said operations for 1920 is as follows:

66 *Average Cost of Property.*

Average Fixed Capital	$184,088,621
Average Construction Work in Progress	7,448,426
Average Working Cash	5,402,362
Average Supplies	3,121,197
Total	$200,060,606

Telephone Revenues.

Exchange Service	$59,071,313
Toll Service	9,474,753
Miscellaneous	1,301,350
Total Telephone Revenue	$69,847,416

Telephone Expenses.

Current Maintenance	$10,139,171
Depreciation and Amortization	9,381,662
Traffic	27,682,021
Commercial	8,324,253
General and Miscellaneous	2,054,620
Uncollectible Operating Revenue	114,340
Taxes	3,926,554
Rent Expense and Deductions	2,184,250
Miscellaneous Deductions	329,331
Licensee Contract Expense	2,963,465
Total Telephone Expense	$67,099,667
Net Telephone Revenue	$2,747,749
Per Cent. Net Revenue	1.37%

1921—First Quarter.

That for the first quarter of 1921 the net return earned by the plaintiff through its intrastate telephone rates and the rendition of its service in the State of New York amounted to 1.29% (annual basis) of the cost of its property used or useful in and devoted solely to the rendition of the said service, including necessary working cash.

67 The detailed figures for the said first quarter of the year 1921 are so follows:

Average Cost of Property.

Average Fixed Capital	$195,210,823
Average Construction Work in Progress	13,658,421
Average Working Cash	5,651,822
Average Supplies	4,322,006
Total	$218,843,072

Telephone Revenues.

Exchange Service	$15,524,390
Toll Service	2,466,300
Miscellaneous	326,707
Total Telephone Revenue	$18,317,397

Telephone Expenses.

Current Maintenance	$2,490,515
Depreciation and Amortization	2,502,152
Traffic	7,390,731
Commercial	2,151,209
General and Miscellaneous	544,026
Uncollectible Operating Revenue	26,276
Taxes	1,014,681
Rent Expense and Deductions	609,658
Miscellaneous Deductions	82,059
Licensee Contract Expense	798,003
Total Telephone Expense	$17,609,310
Net Telephone Revenue	$708,087
Per Cent. Net Revenue (annual basis)	1.29%

68 1921—Second Quarter.

The Public Service Commission of the State of New York, by an order made March 17, 1921, consented to an increase in the rates for exchange service in the City of New York. Under this consent the plaintiff established rates for said service effective April 1, 1921, the rates so established being the maximum rates fixed by the order of said commission made March 30, 1915, plus an addition of 20%.

That during the said Second Quarter of 1921, the plaintiff earned through its intrastate telephone service in the State of New York a return of 6.01% (annual basis) upon the cost of its telephone property in the said State used or useful in and solely devoted to the rendition of said service; that the detailed figures for the Second Quarter of 1921 are as follows:

Average Cost of Property.

Average Fixed Capital	$202,316,597
Average Construction Work in Progress	14,468,772
Average Working Cash	5,797,553
Average Supplies	4,175,502
Total	$226,758,424

Telephone Revenues.

Exchange Service	$18,432,401
Toll Service	2,734,407
Miscellaneous	298,437
Total Telephone Revenue	$21,465,245

69 *Telephone Expenses.*

Current Maintenance	$2,702,479
Depreciation and Amortization	2,591,779
Traffic	6,882,966
Commercial	2,414,437
General and Miscellaneous	595,627
Uncollectible Operating Revenue	30,489
Taxes	1,294,809
Rent Expense and Deductions	606,300
Miscellaneous Deductions	92,970
Licensee Contract Expenses	847,696
Total Telephone Expense	$18,059,552
Net Telephone Revenue	$3,405,693
Per Cent. Net Revenue (annual basis)	6.01%

1921—Last Half.

That, by reason of the order of said commission made June 16, 1921, the rates which had been charged for exchange service in the City of New York during the second quarter of said year were reduced by making the basis 10% in excess of the maximum fixed by the order of March 30, 1915, instead of 20%; that during the last half of the year 1921 the return to the plaintiff on account of it intrastate telephone service in the State of New York amounted to 3.41% of the said cost of the property used or useful in and devoted solely to the rendition of said service; that the detailed figures for the last six months of 1921 are as follows:

Average Cost of Property.

Average Fixed Capital	$210,414,267
Average Construction Work in Progress	18,775,750
Average Working Cash	5,864,486
Average Supplies	3,155,795
Total	$238,210,298

70 *Telephone Revenues.*

Exchange Service	$33,895,231
Toll Service	5,616,407
Miscellaneous	737,924
Total Telephone Revenue	$40,249,562

Telephone Expenses.

Current Maintenance	$5,559,786
Depreciation and Amortization	5,371,791
Traffic	14,141,662
Commercial	4,826,595
General and Miscellaneous	1,043,002
Uncollectible Operating Revenue	58,663
Taxes	1,788,138
Rent Expense and Deductions	1,384,181
Miscellaneous Deductions	216,064
Licensee Contract Expense	1,798,280
Total Telephone Expense	$36,188,162
Net Telephone Revenue	$4,061,400
Per Cent. Net Revenue (annual basis)	3.41%

Year 1921.

That the net return earned by the plaintiff through its intrastate telephone rates and the rendition of its telephone service in the State of New York during the year 1921 amounted to 3.55% of the cost of its property used or useful in and devoted solely to the rendition of the said service, including working cash; and for the month of January, 1922, amounted to 3.52% (annual basis) of said cost; that a statement of said cost and the results of said operations for 1921 and for January, 1922, is as follows:

71 Whole Year 1921.

Average Cost of Property.

Average Fixed Capital	$203,213,238
Average Construction Work in Progress	17,960,228
Average Working Cash	5,793,353
Average Supplies	3,302,764
Total	$230,269,583

Telephone Revenues.

Exchange Service	$67,852,022
Toll Service	10,817,114
Miscellaneous	1,363,068
Total Telephone Revenues	$80,032,204

Telephone Expenses.

Current Maintenance	$10,752,780
Depreciation and Amortization	10,465,722
Traffic	28,415,359
Commercial	9,392,241
General and Miscellaneous	2,182,655
Uncollectible Operating Revenue	115,428
Taxes	4,097,628
Rent Expense and Deductions	2,600,139
Miscellaneous Deductions	391,093
Licensee Contract Expense	3,443,979
Total Telephone Expense	$71,857,024
Net Telephone Revenue	$8,175,180
Per Cent. Net Revenue (annual basis)	3.55%

72 January, 1922—Annual Basis.

Average Cost of Property.

Average Fixed Capital	$213,952,169
Average Construction Work in Progress	23,388,230
Average Working Cash	5,758,372
Average Supplies	3,099,094
Total	$246,197,865

Telephone Revenues.

Exchange Service	$5,911,592
Toll Service	887,827
Miscellaneous	133,957
Total Telephone Revenue	$6,933,376

Telephone Expenses.

Current Maintenance	$925,362
Depreciation and Amortization	918,574
Traffic	2,351,396
Commercial	821,845
General and Miscellaneous	206,312
Uncollectible Operating Revenue	10,288
Taxes	413,787
Rent Expense and Deductions	229,778
Miscellaneous Deductions	39,238
Licensee Contract Expense	294,989
Total Telephone Expense	$6,211,569
Net Telephone Revenue	$721,807
Per Cent. Net Revenue (annual basis)	3.52%

That the amounts by which the net telephone revenues derived by the company from its intrastate telephone business in the
73 State of New York fall short of a return of 8% upon said cost of the property used or useful in and devoted to the rendition of said telephone business are as stated below for the respective periods indicated:

Year 1919	$4,061,182
Year 1920	13,257,099
First quarter 1921	3,668,774
Second quarter 1921	1,129,475
Last half year 1921	5,467,011
Year 1921	10,265,260
January 1922	919,512

JACOB S. WILEY.

Subscribed and sworn to before me this 29th day of March, 1922.
[SEAL.] LINCOLN JONES,
Notary Public, King Co., No. 38.

Cert. Filed in N. Y. Co. No. 66.

74 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of Andrew Sangster.

STATE OF NEW YORK,
County of New York, ss:

I, Andrew Sangster, being duly sworn, on oath state:

I reside at 188 Fairmount Avenue, Chatham, New Jersey.

I am a member of the firm of Sangster and Matthews, Chartered Accountants, with offices at 25 Broadway, New York City, and 134 South La Salle Street, Chicago, Illinois, which firm practises as consulting accountants, specializing in matters pertaining to public utility accounting; that in such capacity the said firm has been employed by various State Public Service Commissions, Municipalities, and Public Utility Corporations to advise and assist in public utility valuations and rate cases, and to perform accounting services in connection therewith.

That in the year 1914 I was appointed Chief Accountant of the Valuation Bureau of the Public Utilities Commission of the District of Columbia, which Commission was then, and for a period of about three years thereafter, engaged in a valuation of all the public utility properties operating in said district, including the Chesapeake
75 and Potomac Telephone Company, which position I continued to hold for a period of about three years; that in 1914 and 1915 I was employed by a Joint Legislative Committee of the State of New York, appointed to investigate telephone rates and service in the City of New York and in the State of New York; that in the year 1917 I was employed by the City of Birmingham, Alabama, to investigate the accounts of the Southern Bell Telephone and Telegraph Company, with reference to its property, revenue and expenses in the cities of Birmingham and Bessemer, Alabama; that in 1919 I was employed by the Chicago Telephone Company (now the Illinois Bell Telephone Company) to investigate and report upon its plant accounting methods for property in the City of Chicago; that in all of the above cases I have appeared before the Public Service Commission or other constituted authority having jurisdiction or supervision therein and testified in regard to matters of accounting. In the practise of my profession I have also acted in a similar capacity with reference to valuations and rate questions affecting street railway, gas, electric light and power, and water companies.

I am familiar with the Uniform System of Accounts prescribed by

rder of the Interstate Commerce Commission for telephone companies throughout the United States and approved and adopted by the Public Service Commission of the State of New York, and I am also familiar with the accounting methods and practices of the New York Telephone Company under the said system of accounts.

That the property of the plaintiff used or useful in the rendition of its telephone service in the State of New York and devoted exclusively to that service is used in the performance of two services as the said services are classified under the rates therefor now in effect, one of these services being the interstate toll service furnished by said company, and the other being the general intrastate telephone service furnished by said company.

That where portions of the said property are not used exclusively for one of these services but are used in both of them, and where expense accounts do not relate solely to one class of service but include both of them, it has been necessary to make separations in order to determine the cost of plaintiff's property devoted exclusively to its intrastate telephone service within the state of New York, and to determine the expenses properly attributable to this service; that the fundamental basis adopted in the making of this separation is the extent to which property so jointly used is used in each of the two classes of service.

A complete list of the accounts covering the plaintiff's property, revenues and expenses relating to its telephone operations is set out below and in connection with each account it is indicated whether it has been necessary to apportion it in order to make the separation between the plaintiff's intrastate and interstate business, and, where the account is apportioned, the basis of the apportionment is set out.

Property.

Account No.

201. Organization.
204. Other Intangible Capital.

These accounts were apportioned in the ratio of the book costs of plant devoted to interstate toll service and to all intrastate service respectively to the book cost of total plant.

207. Right of Way.

This account was apportioned on the basis of the use of exchange and toll lines for interstate toll service and for all intrastate service respectively.

211. Land.
212. Buildings.

These accounts were apportioned between interstate toll service and all intrastate service on the basis of the ratio of book cost of central office equipment devoted to interstate toll service and to all intrastate service respectively to the book cost of total central office equipment.

Account No.

220. Central Office Telephone Equipment.

The book cost of central office equipment in the five separate toll offices in New York City was obtained from the books. The book cost of separate toll switchboards outside of New York City was estimated by applying to the number of operators' positions the estimated average cost per position. The total cost of exclusively toll central office equipment thus determined was apportioned between interstate and intrastate toll service on the basis of its use for the two classes of service respectively.

The cost of message registers was determined and assigned to intrastate service exclusively.

The remaining central office equipment was apportioned between interstate toll service and all intrastate service on the basis of its use for the respective classes of service.

230. Station Equipment.

This account was apportioned on the basis of its use for interstate toll service and for all intrastate service respectively.

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241. Exchange Pole Lines.
242. Exchange Aerial Cable.
243. Exchange Aerial Wire.
245. Exchange Underground Cable.
246. Exchange Submarine Cable.
251. Toll Pole Lines.
252. Toll Aerial Cable.
253. Toll Aerial Wire.
255. Toll Underground Cable.
256. Toll Submarine Cable.

The amount included in these accounts covering interoffice exchange trunks devoted to intrastate service exclusively was deducted and assigned to intrastate service. The balance remaining representing plant used in common for interstate toll service and total intrastate service was apportioned on the basis of its use for the respective classes of service.

244. Exchange Underground Conduit.
254. Toll Underground Conduit.

Subsidiary exchange conduit is devoted to intrastate service exclusively.

The total main underground conduit included in these accounts was apportioned between interstate toll service and all intrastate service on the basis of its use for the respective classes of service.

Account No.

104. Construction Work in Progress.
260. General Equipment.

These accounts were apportioned between interstate toll service and all intrastate service on the basis of the ratio of plant in service devoted to the respective classes of service to total plant in service.

79 *Revenues.*

500. Subscribers' Station Revenues.
501. Public Pay Station Revenues.
502. Miscellaneous Exchange Service Revenues.

These accounts relate to intrastate service exclusively.

510. Message Tolls.
511. Miscellaneous Toll Service Revenues.

The amount included in these amounts representing revenue from interstate service was determined from the records of the company.

523. Advertising and Directory revenue was apportioned between interstate toll service and all intrastate service on the basis used to apportion Directory Expenses—Account 649 as explained hereinafter under "Expenses."

521. Telegraph Commissions.

This account relates to intrastate service exclusively.

525. Other Miscellaneous Revenue.

This account was assigned to intrastate service exclusively.

310. Rent Revenue from Lease of Telephone Plant.

This account was assigned to intrastate service exclusively.

311. Miscellaneous Rent Revenues.

This account was apportioned on the basis of the book cost of buildings attributable to interstate toll service and all intrastate service respectively, to the total book cost of buildings.

401. Miscellaneous Additions to Surplus.

This account was assigned to intrastate service exclusively.

80 *Expenses.*

Account No.

601. Supervision of Maintenance.

This account was apportioned on the basis of the ratio of repairs of plant devoted to interstate toll service and repairs of plant devoted to all intrastate service respectively included in Accounts 602 to 607 inclusive.

602. Repairs of Aerial Plant.

Repairs of Pole Lines, Aerial Cable, Aerial Wire and Right-of-Way were apportioned on the basis of the book costs of the respective classes of plant devoted to interstate toll service and to all intrastate service respectively.

603. Repairs of Underground Plant.

Repairs of Underground Conduit, Underground Cable, Submarine Cable and Right-of-Way were apportioned on the basis of the book costs of the respective classes of plant devoted to interstate toll service and to all intrastate service respectively.

604. Repairs of Central Office Equipment.

Ordinary Repairs charged to this account were apportioned on the basis of the book cost of central office equipment devoted to interstate toll service and to all intrastate service respectively.

Rearrangements and Changes charged to this account were apportioned between exchange service and toll service on the basis of the average number of central office terminations of exchange and toll lines respectively.

The amount thus apportioned to toll service was divided between interstate toll service and intrastate toll service on the basis of the use of such central office equipment for the respective classes of toll service.

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605. Repairs of Station Equipment.

This account was apportioned on the basis of the use of station equipment for interstate toll service and for all intrastate service respectively.

606. Repairs of Buildings and Grounds.

The charges to this account were apportioned on the basis of the use of buildings for interstate toll service and for all intrastate service respectively.

607. Station Removals and Changes.

This account was apportioned on the basis of the use of station equipment for interstate toll service and for all intrastate service respectively.

Account No.

608. Depreciation.

This account was apportioned on the basis of the use for interstate toll service and for all intrastate service respectively, of the several classes of depreciable property.

340. Amortization of Landed Capital.

This account was apportioned on the basis of the use for interstate toll service and for all intrastate service respectively, of exchange and toll right of way.

624. Operators' Wages.

This account was apportioned on the basis of the time devoted by switchboard operators to interstate toll service and all intrastate service respectively.

620. Central Office Superintendence.
625. Central Office Supplies and Expenses.
632. Pay Station Expenses.
633. Other Traffic Expenses.

These accounts were apportioned on the basis used to apportion operators' wages.

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640. Commercial Administration.
642. Advertising.
643. Canvassing.
647. Revenue Collecting.

These accounts were apportioned on the basis of the ratio of interstate toll revenues and all intrastate telephone revenues respectively to the total of such revenues.

644. Sublicensee Relations.

This account was apportioned between interstate toll service and all intrastate service on the basis of the ratio of interstate toll revenue and intrastate toll revenue respectively to total toll revenue.

646. Revenue Accounting.

This account was apportioned on the basis of a study of the cost of work performed in revenue accounting offices attributable to interstate toll service and to all intrastate service respectively.

648. Pay Station Commissions.

This account was apportioned on the basis of the ratio of interstate toll revenue and total intrastate revenue respectively collected from public coin box telephones to the total of such collections.

Account No.

649. Directory Expenses.

83 For New York City the cost of the local city directories distributed to New York City subscribers was charged to intrastate exchange service exclusively. The cost of New York City directories distributed outside of New York City plus the total cost of the suburban directory was charged to interstate and intrastate toll service. For territory outside of New York City intrastate exchange service was charged with the estimated cost of such directories as would be required to meet the needs of exchange service only, the remaining directory expense being charged to interstate and intrastate toll service. The directory expense thus charged to toll service was apportioned between interstate and intrastate toll service on the basis of the ratio of interstate toll revenue and intrastate toll revenue respectively to total toll revenue.

660. General Office Salaries.
663. General Office Supplies and Expenses.
667. General Law Expenses.
668. Insurance.
669. Accidents and Damages.
670. Law Expenses Connected with Damages.
671. Miscellaneous General Expenses.

These accounts were apportioned on the basis of the ratio of total current maintenance, traffic and commercial expenses attributable to interstate toll service and all intrastate service respectively to the total of such expenses.

304. Uncollectible Operating Revenues.

This account was apportioned on the basis of the ratio of interstate toll revenues and all intrastate revenues respectively to the total of such revenues.

84

305. Taxes Assignable to Operations.

This account was apportioned on the basis of the ratio of the book cost of plant devoted to interstate toll service and to all intrastate service respectively to the book cost of total plant.

331. Rent Deductions for Telephone Offices.

This account was apportioned on the basis of the use of rented space for interstate toll service and all intrastate service respectively.

Account No.

332. Rent Deductions for Conduits, Poles and Other Supports.

The portion of this account representing payments to the Empire City Subway Company for rental of ducts in Manhattan and Bronx was apportioned on the basis of the book cost of the underground cable plant devoted to interstate toll service and all intrastate service respectively in Manhattan and Bronx.

The remainder of this account was apportioned on the basis of the book cost of aerial cable and aerial wire devoted to interstate toll service and to all intrastate service respectively.

320. Rent Expense.

This account was apportioned on the basis of the ratio of book cost of buildings attributable to exchange and toll service respectively to the total book cost of buildings used to apportion rent revenue, Account 311, as explained above.

341. Miscellaneous Deductions from Income.

This account was apportioned on the basis of the ratio of interstate toll revenues and total intrastate revenues respectively to the total of such revenues.

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417. Other Deductions from Surplus.

The part of this account applicable to operations was apportioned on the basis of the ratio of the book cost of plant devoted to interstate toll service and to all intrastate service respectively to the book cost of total plant.

527. Licensee Revenue—Dr.

This account was apportioned on the basis of the relation of interstate toll revenue and total intrastate telephone revenues respectively to the total of such revenues.

That I have read the affidavit of Jacob S. Wiley made herein, also verified on the 29th day of March, 1922, and personally participated in making the separation referred to in the said affidavit between the interstate and intrastate property, revenues and expenses of the plaintiff.

That the said separation was made upon the basis set out in my foregoing affidavit, and the results reached in making the said separation are, in my opinion, substantially correct.

ANDREW SANGSTER.

Subscribed and sworn to before me this 29 day of March, 1922.

[SEAL.] LINCOLN JONES,

Notary Public, Kings Co., No. 38.

Cert. Filed in N. Y. Co. No. 66.

86 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of George W. Whittemore as to Value.

STATE OF NEW YORK,
County of New York, ss:

George W. Whittemore, being duly sworn, deposes and says that he resides in the Borough of Brooklyn, City and State of New York; that he is fifty-three years of age and in the year 1892 was first employed in telephone engineering work and in 1899 was employed in that work by the Bell Telephone Company of Buffalo and was continuously employed by that Company until the year 1910, when he entered the employ of the New York Telephone Company and he has since been employed continuously by the plaintiff Company in engineering, appraisal and construction work.

That he is thoroughly familiar with telephone properties and with the work, labor and materials entering into the construction of the same and with the units of cost thereof and in the regular course of his employment he has been engaged in making appraisals of telephone properties situated in the States of New York, New Jersey,
87 Maryland, Virginia, West Virginia and Ohio and in the District of Columbia, the aggregate value of which runs into hundreds of millions of dollars, and during the last twelve or thirteen years he has been giving particular attention to the analysis of all costs incurred by telephone companies in all work of construction performed by them.

That he is thoroughly familiar with the entire property belonging to the plaintiff company in the State of New York and devoted by it to the furnishing of intra-state telephone service in said State, and for some years past has been engaged in the making and keeping of an inventory thereof. That for several months he has been employed with a large force under his direction in making an appraisal of said property and in the course of such employment he has made a valuation as of the present time of all of the property used or useful in and devoted exclusively by the plaintiff to the rendition of its intra-state telephone service in the State of New York.

That in arriving at the present fair value of said property of plaintiff hereinafter stated, he has taken into consideration among others the following facts and matters:

(*a*) The original cost of said property as stated in the affidavit of Jacob S. Wiley, the chief accounting officer of the plaintiff, verified the 29th day of March, 1922, and the fact that said cost includes the cost of a large amount of property, approximately fifty per cent of the total, which was constructed prior to the year 1914, before the increases in labor and material costs due to conditions prevailing during and since the World War became operative.

(*b*) The cost of reproduction new of said property. By using the actual quantities or units of property making up the said plant used or useful and devoted exclusively to the rendition of in-
88 tra-state telephone service by the plaintiff in the State of New York and applying thereto the prices of materials and labor current as of this time, deponent has determined the cost of reproduction of such property to be in excess of $225,000,000 for The City of New York and in excess of $117,000,000 for the State of New York exclusive of The City of New York, making a total in excess of $342,000,000 for the entire State of New York. If there be added to the last mentioned figure a reasonable allowance for working cash capital, materials and supplies, and going concern value, said cost of reproduction of the entire property new is in excess of $373,000,000. In ascertaining the cost of reproduction new, above stated, deponent has used prices which he regards as moderate and which are considerably lower than the prices prevailing during and since the World War; a striking example being copper, where he has used a price at least thirty per cent lower than the average price of that metal for twelve years last past. In the case of lead he has used the present price, which is from twenty to twenty-five per cent lass than the average price of that metal for the past twelve years. The prices deponent has used for both copper and lead are less substantially than the prices it would be necessary to use if an effort were now made actually to reproduce the property of the plaintiff. Lead and copper are the principal materials used in the manufacture of the cables and wires which have been installed in the plaintiff's plant at a cost of more than $69,000,000 as shown by its books, and form a large part of the plaintiff's property devoted exclusively to its said telephone service.

Said telephone property of the plaintiff is and has been at all times during this deponent's employment by the plaintiff in a 100% service condition, but this deponent has from time to time observed, in-
89 spected and examined the said property and parts thereof and in a general way is familiar personally with the present physical condition of said property. Deponent has taken into consideration in arriving at the present fair value of said property such deterioration in the property as actually exists.

(*c*) Appraisals made of the lands and buildings owned by the plaintiff throughout the State of New York as determined by disinterested appraisers familiar with real estate values in the various localities in which the parcels of such lands and buildings are located, which appraisals show an average value thereof of 67% over the

costs of such lands and buildings as shown on the books of the plaintiff.

(*d*) Based upon his experience in examining and appraising the properties and operations of various other telephone corporations and his knowledge of plaintiff's actual requirements over many years for working cash capital and materials and supplies necessary in the rendition of its intra-state telephone service in the State of New York, deponent has estimated the amount reasonably required by plaintiff for such purposes at not less than $13,500,000.

That after giving careful consideration to all of plaintiff's property, its history, location and character, and to the factor usually called "going concern value," to all the factors and matters above enumerated and to all other factors within deponent's knowledge affecting its value, it is the opinion of the deponent that the fair present value of the entire property of the plaintiff used or useful and exclusively devoted by it to furnishing intra-state telephone service in the State of New York is in excess of $218,000,000 in The City of New York and in excess of $105,000,000 in the State of New York, exclusive of said City, making a total present fair value of said property in excess of $323,000,000 in the entire State of New York.

Deponent further says that in arriving at such present fair value he has made no allowance whatever for the value of any of plaintiff's franchises or rights to own and operate a telephone system in said City or in any part of the State of New York.

That as a basis for his appraisal as aforesaid deponent has apportioned the property between inter-state and intra-state service in accordance with the separation set forth in the affidavit of Andrew Sangster, verified the 29th day of March, 1922.

(Sd.) GEORGE W. WHITTEMORE.

Subscribed and sworn to before me this 29th day of March, 1922.

[SEAL.] (Sd.) LINCOLN JONES,
Notary Public, Kings Co. No. 38.

Cert. Filed in N. Y. Co. No. 66.

91 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of Halbert P. Gillette.

STATE OF NEW YORK,
County of New York, ss:

Halbert P. Gillette, being duly sworn, deposes and says:

That he is 52 years of age; that he resides in Chicago, Illinois; that he is a consulting engineer; that he was graduated from the Engineering Department of Columbia University in the year 1892 and has practiced and followed the profession of civil engineering ever since graduation; that he was Assistant New York State Engineer in the years 1896-7 and following that was engaged in the contracting business in the State of New York until 1902; that in 1906 became Chief Engineer of the Railroad Commission of the State of Washington and appraised the railroads in that State during the years 1906-7; that since that time he has had considerable experience appraising various properties embracing $750,000,000 worth of public utilities inclusive of telephone properties, in the States of Washington, Oregon, California, Nevada, Texas, Pennsyl-
92 vania, New York, New Jersey, Vermont and Massachusetts: among these was the appraisal of the telephone system of The Bell Telephone Company of Pennsylvania, a corporation furnishing service throughout the State of Pennsylvania, with a property conservatively valued at over $100,000,000 in the year 1920, that he was a member of the committee selected to appraise the property of the New York Telephone Company in the year 1914; that the committee of which he was a member made a detailed inventory of all kinds of property owned by said Company in the States of New York and New Jersey and that said property was appraised as of December 31, 1914; that in an investigation by the Joint Committee of the Senate and Assembly to investigate and examine into telephone, telegraph and other forms of electrical communication, he testified, on February 22, 1915, as to the fair value of the telephone property of the New York Telephone Company in the City of New York as of December 31, 1914, and that the Public Service Commission, Second District, State of New York, shortly thereafter found a value substantially in accord with the value of the property

as testified to by him; that he also testified and submitted an estimate of value of the property of the New York Telephone Company in the Buffalo local area in a proceeding before the Public Service Commission, Second District, State of New York, entitled "In the matter of the complaint of the city of Buffalo, by George S. Buck, Mayor, against New York Telephone Company—Case No. 6427," in the year 1920; that he also appraised the property of the New England Telephone & Telegraph Company in the State of Vermont in the year 1915; that through his work in connection with the aforesaid appraisal of the New York Telephone Company's property in the year 1914 as of December 31, 1914, and through the Buffalo local area appraisal above-mentioned, he became
93 familiar with the property of the New York Telephone Company, with its methods of accounting, and with the costs of labor and materials used in telephone construction in the State of New York; that he has familiarized himself with the additions which have been made to the said Company's property since December 31, 1914.

That for more than twenty years he has specialized in the cost of construction, operation and maintenance of public utilities and public works.

That he has written a great many articles and several books on the subject of construction costs, notably his Handbook of Cost Data and his Handbook of Mechanical and Electrical Cost Data, the latter being a book in joint authorship with R. T. Dana; that he has published numerous articles on cost accounting and engineering economics; that he has made extensive studies of price and wage levels and has published many articles thereon.

That, taking into account his aforesaid appraisal of the New York Telephone Company's property as of December 31, 1914, and his recent studies of the additions made to that property up to December 31, 1921, and taking into consideration the changes in prices of telephone plant and materials and construction wages, and such prices at present, he estimates that the approximate cost of reproducing the New York Telephone Company's property in the State of New York used or useful in and devoted exclusively to the rendition of its intrastate telephone service as of the present time, would be at least $350,000,000, inclusive of materials and supplies but exclusive of working cash capital and items such as cost of establishing the business, going value and franchise value; that in arriving at the said estimate of reproduction cost as of the present time he has excluded that part of the plaintiff's plant devoted to the
94 rendition of its interstate toll service in accordance with the bases of separation shown by the affidavit of Andrew Sangster, verified the 29th day of March, 1922; that a reasonable allowance for working cash capital, not included in the above $350,000,000, would be at least $10,000,000. That in his said estimate of $375,000,000 as the value of said property at the present time he has taken the appraised value of land, totaling $12,500,00 in round numbers, as given by disinterested local real estate appraisers.

That the prices of raw materials used in telephone construction in the State of New York are now as low on the average as they probably will be during the year 1922, and that there is strong likelihood that they will average higher during the rest of the year than at present.

That deponent's opinion in regard to said prices is based on the following considerations: Of the raw materials that are used in telephone plant construction copper is the material most extensively used and its price is now below the pre-war average price. According to statistics published by the United States Bureau of Labor the average wholesale price index or price level was, for February, 1922, 51% above the average for the year 1913, and that for eleven months this wholesale commodity price level has scarcely changed; that the peak of this wholesale commodity price index was reached in May, 1920, and that a very rapid decline occurred for eleven months thereafter, reaching the present level in April, 1921, where it has remained; that the price level of building materials, other than metals, followed the same history and has now been stationary, practically, for eleven months; that average union wages in the building trades in New York City have not changed for more than a year; that average wages in 1,648 factories in New York State, as published by the New York State Department of
95 Labor, have declined only 12% in the past twelve months and for four months have not declined at all; the average wages paid by the New York Telephone Company at the present time for construction purposes are no higher, proportionately, than union labor wages in the building trades and the average factory wages in the 1,648 New York State factories above-mentioned.

That a study of wage levels made by deponent and published in Engineering and Contracting on August 3, 1921, shows that for the past eighty years in the United States average daily wages have been proportional to two factors: first, per capita money, and second, rate of money turnover or circulation; that the rate of money circulation rises about 15% in boom times and falls about 15% in hard times, always returning to a normal.

That in consequence of this moderate oscillation from the normal the controlling factor in establishing wage levels over a period of years is the per capita money; that the per capita money is now 50% above the amount that it was in the year 1913; that the United States has 40% of all the gold in the world; that all the great industrial nations of the world are so deeply indebted to the United States that they are not likely to recover much, if any, of this American gold for several years; that the per capita gold in the United States is 80% above that in 1913; that in a nation having a gold standard the increase in per capita money tends to exceed the increase in per capita gold, hence, that our present per capita money will probably increase during the next few years.

That wages constitute about 75% of the ultimate cost of all products and services, capital receiving about 25%, hence, that as wages rise prices of commodities must rise, unless efficiency of pro-

duction increases; that per capita efficiency of production in America has been calculated by deponent for every year for the
96 past sixty years and that although this efficiency of production has ordinarily shown a steady rise it has never risen at a better rate for a decade than 2% per annum, hence, that there is no probability that the average commodity price level will decrease faster than 2% annually, due to a general increase in efficiency of production; that in the construction trades the efficiency of workmen is now practically what it was in 1914 and that the same holds true of manufacturing in general, hence, that over short periods of time, such as two or three years, the controlling factors in determining commodity price levels are the same as those that determined wage levels; that the significance of these economic facts in this connection is this: the cost of the labor and material required for reproducing the plant of the New York Telephone Company is now probably lower than it will be during the next year or two.

That the only comparable period of great changes in price and wage levels in America was the Civil War period and the years that immediately followed; that following the close of the Civil War in 1865 there was a rapid decline in commodity price levels for two years, the low point being reached in 1867; that from this low mark there was a substantial rebound in 1868; that thereafter the decline was relatively slower and that not until 1884 was the prewar price level reached again; that building material prices following the Civil War declined even more slowly than did the average of all other commodity prices; that in 1873 the level of building material prices was 72% above the level in 1860, and that the level of wages in 1873 was 67% above the wage level in 1860; that although the wage level following the panic of 1873 declined slowly it never reached a point lower than 42% above the level of 1860, and that thereafter the average level steadily rose; that the wage movement during
97 and following the Civil War was quite similar to that experienced in this country during and following the recent World War; that the same factor that brought the decline in wages to an end after the Civil War, namely, the high per capita money, has similarly brought a halt to the recent decline in wages; that the existence of flexibility in the present American currency, due to the Federal Reserve Banking System, has not affected the law that wages and price levels tend to change with change in per capita money but has simply exemplified the truth of that law; in fact this law of dependence of wage and price levels upon per capita money has been as completely exemplified during the years 1914-1922 as it was during the years 1861-1869.

HALBERT P. GILLETTE.

Subscribed and sworn to before me this 29th day of March, 1922.

[SEAL.] LINCOLN JONES,
Notary Public, Kings Co. No. 38.

Cert. Filed in N. Y. Co. No. 66.

98 District Court of the United States, Southern District of New York.

In Equity.

No. 23,252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of Harry M. Addinsell.

STATE OF NEW YORK,
County of New York, ss:

Harry M. Addinsell, being duly sworn, says that he resides at Locust Valley, New York, and is an investment banker. That he is a director of Harris, Forbes & Company, New York City, and has been with that investment house for sixteen years continuously with the exception of two years during which time he was in the World War. That said house is a member of the Investment Bankers Association and that deponent was formerly a Chairman of the Public Utility Securities Committee of that Association.

That Harris, Forbes & Company deals exclusively in investment securities of the classes offered to what are known in banking circles as the conservative investor and it therefore confines its purchases to and sales of securities to those which it considers to be conservative investments and is, and for many years has been, one of the largest houses handling public utility securities. That it is the practice of deponent's said house to make an investigation
99 of the operations of any public utility before it deals in the securities of such utility; that when a proposal is made to it to handle such securities it first makes a preliminary investigation of the facts and figures relating to the company generally in order to determine whether or not there is a safe basis for the bonds or other securities which it is asked to handle, and if that matter is determined satisfactorily the investigation is continued by having an engineering examination made by competent engineers and accounting examinations made by expert accountants.

That Harris, Forbes & Company and its predecessor, N. W. Harris & Co., have been in business for about forty years and during that period have had occasion to make extensive investigations into the operations, properties, earnings and securities of a great many electric, gas, telephone, street railway, water and other public utilities.

That it is the opinion of the deponent that a public utility such as the plaintiff should earn an annual return of not less than 8% (after providing for depreciation) upon the fair and reasonable value of its property used or useful in the rendition of its service in order to place

its securities upon a parity with other investments competing for funds in the market.

That in order to make the securities of a public utility saleable, it is necessary that public confidence in such securities be established and maintained. The investors must have reasonable assurance of the integrity of the investment and the safety of their money, and must be afforded a return at least equal to the returns which they could obtain through other available investments of similar desirability.

That the cost to public utilities of borrowed money, where the loans are adequately secured and where there is a fixed obligation to return the money borrowed at a definite date, is obviously less
100 than the fair return necessary to induce the investment of funds that are to be invested at the risk of the business. That the cost of borrowed money to public utilities during the last three years has run as high as 10% for short term loans and has averaged over 7% for long time money. That at present such corporations cannot obtain money on long time loans, even though adequately secured, at less than an average cost of approximately 6%. That prudence and conservatism dictate that only a proportion of the capital requirements of such corporations should be raised by the sale of bonds or other loans. That it is fundamental that public utilities which expect to continue permanently in business and which are required continuously to increase their investments in order to meet the public service requirements imposed upon them must have a market for their stocks, and their stocks are not saleable to investors unless it can be demonstrated that the company offering such stocks is earning and will continue to earn at least a reasonable return upon the value of its property devoted to the public use. That there is active competition among utility corporations, industries and other businesses for the surplus funds which are at any time available for new investments, and plaintiff, like the others, is compelled to meet this competition and to offer inducements to investors equal to those offered by others at the same time.

HARRY M. ADDINSELL.

Subscribed and sworn to before me this 29th day of March, 1922.

[SEAL.] KENNETH C. WALFORD,
Notary Public, Kings Co., No. 120.

Cert. filed in N. Y. Co. No. 300.
Register's Office, Kings Co. No. 2107.
Register's Office, N. Y. Co. 2225.
Commission expires March 30, 1922.

101 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of Arthur D. Welch.

STATE OF NEW YORK,
County of New York, ss:

Arthur D. Welch, being duly sworn, deposes and says that he is forty-three years of age, a graduate of the University of Vermont, Class of 1902, with a degree of Bachelor of Sciences and electrical engineering.

That he has been employed by the New York Telephone Company and one of its predecessor corporations, The New York and New Jersey Telephone Company, which operated in the City of Brooklyn, Long Island and Staten Island until the year 1909, for more than nineteen years. That since April 1, 1920, he has been General Commercial Superintendent of the plaintiff and prior thereto was for thirteen years General Commercial Engineer of the plaintiff. That while commercial engineer and in his present position as General Commercial Superintendent he had and has charge and supervision of the making of schedules of rates for the plaintiff and the preparation of studies in relation thereto and the study of the
102 the effect of rates on the revenues of the Company, and that he is familiar with all the rates and charges which are made by the plaintiff for the telephone service and facilities furnished by it and with the schedules of such rates which are now and have been from time to time filed by the plaintiff with the Public Service Commission of the State of New York and its predecessor Public Service Commission of the Second District, and with the changes in the rates so filed which have been made in accordance with the orders of said commissions. That the rates which the plaintiff now has in effect for telephone service in the City and State of New York have been continuously in effect since July 1, 1921, except that in the City of Buffalo slight decreases in exchange rates were made on November 1, 1921, pursuant to an order of the Public Service Commission dated October 27, 1921, the amount of which decreases were equal to only 1/33 of 1% of the total exchange revenues of the Company in the State of New York for the year 1921. That deponent is familiar with all the orders made by the Public Service Commission of the State of New York and by its predecessor the Public Serv-

ice Commission of the Second District which are referred to in the affidavit of Frankland Briggs, verified the 29th day of March, 1922, which deponent has read, including the recent orders of the said Public Service Commission dated March 3, 1922, in cases 377 and 7720, directing reductions on and after April 1, 1922, in certain exchange rates charged for exchange service in the City of New York and in the part of the State of New York outside of the said City. That he has made a careful and detailed estimate as to the effect on the revenues of the Company in the event that the rates prescribed by said orders should become effective, taking into consideration the probable growth in the number of telephones which will be in service during the year 1922, and if such reduced rates should in
103 fact become effective they would cause a large and substantial reduction in the revenues of the plaintiff, and such reduction would not be less than $2,150,000 per annum in the City of New York and not less than $750,000 per annum in that part of the State of New York which is outside of said City, and would cause a total reduction in the revenues of the plaintiff in the State as a whole of not less than $2,900,000.

That if the rates prescribed by said orders of the Public Service Commission of March 3, 1922, had been in effect during the whole of the year 1921 and had been applied to the exchange service furnished by the plaintiff during that year, the revenues of the plaintiff in that year in the State of New York would have been reduced by not less than $1,000,000 in The City of New York, and not less than $700,000 per annum in the cities, towns and villages of the State of New York outside of the City of New York, and would have caused a total reduction in the revenues of the plaintiff from its said exchange service in said year of not less than $1,700,000 in the State as a whole.

A. D. WELCH.

Subscribed and sworn to before me this 29th day of March, 1922.
[SEAL.] LINCOLN JONES,
Notary Public, Kings Co., No. 38.

Cert. Filed in N. Y. Co. No. 66.

104 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of Frankland Briggs.

STATE OF NEW YORK,
County of New York, ss:

Frankland Briggs, being duly sworn, deposes and says that he is Attorney in Charge of Commission Matters of the New York Telephone Company, plaintiff in this suit. That he has charge for said company of all matters and proceedings before the Public Service Commission of the State of New York, which commission has been in office since on or about May 1, 1921, and prior to said date had charge of all such matters and proceedings before the predecessor of that commission, the Public Service Commission, Second District, of the State of New York, which commissions have had general jurisdiction and powers of supervision and regulation over the plaintiff company and other telephone and telegraph corporations since the year 1910.

That he is familiar with the proceedings before said commissions relating to the rates and charges of said company in the State of New York. That certain orders have been issued relative to rates in The City of New York and certain other orders relative to rates
105 in the territory operated by the plaintiff in the State of New York outside of said city and in the state as a whole.

Part I.

Rate Changes and Commission Orders in the City of New York.

That the said Public Service Commission, Second District, did on March 30, 1915, in a proceeding entitled "In the Matter of Investigation of rates and charges for service rendered by the New York Telephone Company within The City of New York (Case No. 4089)" make a general order effective July 1, 1915, establishing ten message rate zones in said The City of New York fixing schedules of maximum rates for each zone and maximum toll rates between zones, directing that certain flat rates then in force should continue and covering certain other details, as more fully appears in the copy of said order attached to the bill of complaint as Exhibit A. That on

July 1, 1915, plaintiff put into effect as its rates the maximum rates permitted by said order.

That it was provided in said order that said rates should remain in force for a period of three years and thereafter until further order of the commission.

That during the period commencing August 1, 1918, and ending July 31, 1919, the property of the plaintiff was in the possession of and under the supervision and control of the United States Government pursuant to a resolution of Congress and proclamation of the President, during which period no changes were made in the rates in effect in The City of New York.

That the said Public Service Commission, Second District, did on September 16, 1919, in a proceeding entitled "In the Matter
106 of Investigation of rates and charges for service rendered by the New York Telephone Company within The City of New York (Case No. 6974)" make an order effective October 1, 1919, modifying the order of March 30, 1915, by providing for a discount of 8% from the rates and charges prescribed in said order. By the terms of said order of September 16, 1919, the rates so prescribed were to continue in effect for the period of one year or thereafter. That a copy of said order is attached to the bill of complaint as Exhibit B. The plaintiff on and after October 1, 1919, put into effect the maximum rates permitted by said order.

The plaintiff on or about August 28th, 1920, filed a petition with the Public Service Commission, Second District, praying for the consent of said Commission to the establishment on and after October 1, 1920, of a new schedule of rates for telephone service in The City of New York, more fully set forth in said petition. That said Commission held hearings on said application on the 18th day of October, 1920, and on other dates subsequent thereto, and at such hearings the plaintiff offered testimony, proofs and exhibits in support of its application. Hearings in said proceeding are being held from time to time and the matter is still pending and undisposed of, the taking of testimony not having yet been completed. That during the pendency of such proceeding and on or about February 23, 1921, the plaintiff applied to the Public Service Commission, Second District, for its consent to increase its rates beyond the maximum theretofore fixed by said Commission and the said Commission on March 17, 1921, made an order effective April 1, 1921, in a proceeding entitled as follows: "Petition (or complaint) of New York Telephone Company, under subdivision 1, Section 97, Public Service Commissions Law, in respect to increasing rates, charges, tolls and rentals to be charged by it for telephone service in New York
107 City (Case No. 7720)." In said order it referred to the previous orders of March 30, 1915, and September 16, 1919, and to the greatly increased operating expenses of the plaintiff and other facts which indicated that the plaintiff was entitled to an immediate increase in its rates and charges. Said order provided that pending the further continuation of said proceeding and without affecting the final determination thereof the commission did consent that from and after April 1, 1921, and until further ordered

n the premises the exchange rates of plaintiff company for tele-hone service in The City of New York should be increased by the limination of the 8% discount specified in said order of September 6, 1919, and by the addition after such elimination of 20% of all ates and charges for such service and facilities prescribed by said rder of March 30, 1915. a copy of which said order is attached to he bill of complaint as Exhibit C. Plaintiff on April 1, 1921, put nto effect the maximum rates permitted by said order.

That the Public Service Commission of New York did on June 6, 1921, make an order effective July 1, 1921, which provided that he said order of March 17, 1921, be modified and that the Commis-ion consent and authorize that from and after July 1, 1921 and ntil its further order in the premises, the rates of said plaintiff ompany for exchange telephone service in said The City of New ork be temporarily determined by the elimination of said 8% iscount specified in said order of the Public Service Commission, econd District, dated September 16, 1919, and by the addition fter such elimination of 10% to the rates and charges for exchange elephone service and facilities determined and fixed by said order f the Public Service Commission, Second District, dated March 30, 1915. That a copy of said order of June 16, 1921, is at-108 tached to the bill of complaint and marked Exhibit D.

That plaintiff put into effect on July 1, 1921, the maximum ates permitted by said order.

That on March 3, 1922, the commission made a further tem-orary order providing that from and after April 1, 1922, and until s further order in the premises, the rates of the plantiff Company or telephone exchange service in The City of New York should be emporarily determined by the elimination of the 8% deduction pecified in the said order of the Public Service Commission, Second istrict, dated September 16, 1919, and by the addition after such limination of 5% to the rates and charges for exchange telephone ervice and facilities determined and fixed by said order of the Public ervice Commission, Second District, dated Harch 30, 1915. That copy of said order is attached to the bill of complaint, marked xhibit E.

Part II.

ate Changes and Commission Orders in the State of New York Outside of the City of New York and in the State as a Whole.

That, as heretofore stated, the property of the plaintiff company as under the supervision and control of the Federal Government uring the period from August 1, 1918, to July 31, 1919, and that hile under such supervision and control, on May 1, 1919, certain chedules of rates increasing those previously in force were put into ffect by the Postmaster General of the United States.

That on December 1, 1919, certain schedules of increased rates heretofore duly filed by the plaintiff with the Public Service Com-ission, Second District, pursuant to the provisions of Section 92

of the Public Service Commissions Law, became effective gen-
109 erally throughout the State of New York, except in The City of New York and a few minor instances where rates had previously been prescribed by orders issued by said commission. Subsequently complaints against such increased rates were filed with the said Commission by more than one hundred forty cities, towns and villages of said State alleging that such rates were unreasonable and unjust.

That while such complaints were still pending and undisposed of before said Commission, the Company filed schedules of rates effective September 1, 1920, further increasing the rates made effective December 1, 1919.

That early in the year 1920, the Public Service Commission, Second District, commenced the holding of hearings upon the complaints filed by the Cities of Syracuse and Buffalo respecting the rates charged by plaintiff in those cities, and hearings in these cases were finally completed before said Commission but were not determined by said Commission prior to its being superseded by the present Public Service Commission. The present Commission heard arguments in such proceedings, and on August 4, 1921, made an order dismissing the complaint of the City of Syracuse on the ground that the rates complained of were not unjust or unreasonable, and on October 27, 1921, it made an order reducing to some extent the rates charged by plaintiff in the City of Buffalo.

That on November 10, 1921, the said present Public Service Commission made an order commencing on its own motion a general investigation as to the rates throughout the State, including The City of New York, the scope of the investigation being more fully set forth in the copy of the order hereto attached and made a part hereof.

That a number of hearings have been and are still being
110 held from time to time in the proceeding commenced by said order, and said proceeding is now pending and undetermined.

That on March 3, 1922, the said Public Service Commission of New York made an order in the last mentioned proceeding that it appearing to the satisfaction of the Commission that the public interest required a change in the rates for telephone service charged by the New York Telephone Company within the State of New York (including the City of New York) temporarily and pending a final determination of the rates, charges and rentals to be thereafter demanded, certain rates as prescribed in said order be established as the rates to be charged from and after April 1, 1922, in the various cities, towns and villages in said State of New York specified in said order, such rates to remain in force and effect pending a final determination as to the rates, charges and rentals thereafter to be charged or until further order of the Commission. That said order further specifically povides that "All rates, charges and rentals applying to any and all other service furnished by said New York Telephone Company to be and remain as stated in the Company's schedules of rates, rentals and charges for service." That a copy of said order is attached to the bill of complaint and marked Exhibit F.

That by the terms of said order the rates now charged by the Company outside The City of New York are substantially reduced in amount.

Part III.

Rates Now in Effect.

That the rates now in effect throughout the State of New York, including The City of New York, have been continuously in effect from and after July 1, 1921, with the exception of certain changes made in the local exchange rates in the City of Buffalo as
111 prescribed by said order of the Public Service Commission dated October 27, 1921, which said changes were comparatively slight in amount and affected less than one-half of one per cent of the total gross revenues of the plaintiff company in the State of New York from its exchange service.

FRANKLAND BRIGGS.

Subscribed and sworn to before me this 29th day of March, 1922.
[SEAL.] LINCOLN JONES,
Notary Public, Kings Co., No. 38.

Cert. Filed in N. Y. Co. No. 66.

112 *Exhibit Attached to Affidavit of Frankland Briggs.*

State of New York,

Public Service Commission.

At a Session of the Public Service Commission Held in the City of New York on the 10th Day of November, 1921.

Present:

William A. Prendergast,
Chairman;
William R. Pooley,
Charles Van Voorhis,
Oliver C. Semple,
Charles G. Blakeslee,
Commissioners.

In the Matter of the Hearing on Motion of the Commission as to Rates, Charges, and Rentals and the Regulations and Practices Affecting Rates, Charges and Rentals of THE NEW YORK TELEPHONE COMPANY [Case No. 377].

On the motion of the Commission,
It is Ordered:

(1) That a hearing be had as to the rates, charges, tolls and rentals, demanded, exacted, charged or collected by the New York

Telephone Company, within the State of New York, for the transmission of messages or communications by telephone, and for the rental or use of any telephone line, receiver, transmitter instrument, wire, cable, apparatus, conduit, machine, appliance or device or any
113 extension or extension system; and as to the rules, regulations and practices of said New York Telephone Company affecting such rates, charges, rentals or service; to the end that if the same or any part thereof be unjust, unreasonable, unjustly discriminatory or unduly preferential, or anywise in violation of law, or if the maximum rates, charges or rentals chargeable by said New York Telephone Company are insufficient to yield reasonable compensation for the service rendered, the Commission may determine the just and reasonable rates, charges and rentals to be thereafter observed and in force as the maximum to be charged, demanded, exacted or collected for the performance or rendering of the service specified and fix the same by order;

(2) That such hearing be held at the office of the Commission, No. 91 State Street, Albany, New York, on the 29th day of November, 1921, at 10 a. m.

(3) That notice of the time and place of such hearing be given, by the secretary of this Commission, to said New York Telephone Company, and to the complainants in proceedings as to any rates, charges, or rentals of said New York Telephone Company, now pending before this Commission undetermined, and others.

By the Commission.
[SEAL.]

FRANCIS E. ROBERTS,
Secretary.

114 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of George W. Whittemore as to Depreciation.

STATE OF NEW YORK,
County of New York, ss:

I, George W. Whittemore, being duly sworn, on oath state:

That I am the George W. Whittemore who made the affidavit herein as to value verified March 29th, 1922.

That the property used by the plaintiff in the rendition of its service is classified under the system of accounts prescribed by the

Interstate Commerce Commission, the so-called depreciable property being shown under the following items, with the account numbers as indicated:

212. Buildings.
221. Central Office Telephone Equipment.
222. Other Equipment of Central Offices.
231. Station Apparatus.
232. Station Installations.
233. Interior Block Wires.
234. Private Branch Exchanges.
235. Booths and Special Fittings.
241. Exchange Pole Lines.
242. Exchange Aerial Cable.
115 243. Exchange Aerial Wire.
244. Exchange Underground Conduit.
245. Exchange Underground Cable.
246. Exchange Submarine Cable.
251. Toll Poll Lines.
252. Toll Aerial Cable.
253. Toll Aerial Wire.
254. Toll Underground Conduit.
255. Toll Underground Cable.
256. Toll Submarine Cable.
261. Office Furniture and Fixtures.
262. General Shop Equipment.
263. General Store Equipment.
264. General Stable and Garage Equipment.
265. General Tools and Implements.

That, in the rendition of its service, the plaintiff uses up the property of the classes indicated in the foregoing classification.

For instance, a switchboard, which under the above classification would come under the head of central office equipment, Account No. 221, will have a certain useful life in the rendition of the company's service, at the expiration of which it will be discarded.

Among the causes which end the useful life of any piece of depreciable property are natural wear and tear, obsolescence, the fact that it becomes inadequate for the service required of it, public requirements, that is, requirements of public authorities that render necessary changes in plant, storms, fires and other casualties.

When property is discarded, usually more or less salvage is realized from it. Under the said accounting rules and practices, the term "net salvage" means the net amount realized from the discarded property; that is, the amount realized from it, less the cost of removing and disposing of it.

The amount of this net salvage will obviously vary radically with the different classes of property. For instance, if it were
116 necessary to take down an old pole line, probably the cost of taking the pole line down would amount to more than the poles could be sold for so that here the net salvage would be a minus amount. On the other hand, in the case of the switchboard, the net

salvage would be a substantial amount, although the fact that the relatively large item of labor incident to its original installation would be entirely lost, would tend to minimize such net salvage.

The cost of depreciable property used up in the rendition of the plaintiff's exchange service, less the net salvage recovered on account of this property when it is discarded, is a part of what it has cost the plaintiff to render this service during the term of the useful life of the property in question.

Under the said accounting rules and practices and under the accounting rules of the Public Service Commission of the State of New York, the plaintiff is required to charge this cost or expense to its operating expenses, except certain minor items charged initially to certain clearing accounts, in equal periodical increments during the useful life of the property, and this is done month by month. At the time that this charge is made to operating expenses a corresponding credit is made to the account entitled "Reserve for Accrued Depreciation."

When a piece of property is discarded, this account "Reserve for Accrued Depreciation" is charged with the difference between the cost of this property and the net salvage recovered from it. At the same time the proper fixed capital account is reduced by the amount of the original cost of the property in question.

This cost of rendering plaintiff's service is treated in the accounts in the same manner in which other cost items extending over a considerable period are treated. In the cases of taxes covering a year, or interest covering a fixed period, or expenses of financing
117 and bond discounts covering a number of years, the total expense is ascertained and is then charged to the operating expenses and credited to the account entitled "166—Taxes Accrued," or "167—Accrued Liabilities Not Due," as the case may be, against which account the payment when made is charged in a lump. In none of these cases is any specific reserve actually set aside.

While the depreciation account is entitled "Reserve for Accrued Depreciation," no reserve in the sense of a fund set aside for this specific purpose is maintained. The moneys taken out of earnings and represented by these charges to operating expenses and credits to this account go into the general funds of the plaintiff and find their way into property and plant owned by it so that as parts of its investment are retired, they are replaced by other investments in a like amount and its capital is maintained unimpaired.

The factors which determine the amount which should be periodically charged to the operating expenses and credited to the account "Reserve for Accrued Depreciation" are the original cost of the property, the net salvage, the term of its useful life, and the coefficient of safety which good business management requires in cases where expense items are to be met, the amount of which cannot be exactly known in advance. The original cost is readily and definitely ascertainable. What will be the useful life of any piece of telephone property and what will be the net salvage recovered upon the termination of this life, are factors looking to the future which must necessarily be based upon estimates founded upon the

judgment of those educated in the business applied to the recorded experience of the company over a long series of years.

While the exact time when any specific piece of property will go out of use may not be accurately determinable, the average
118 useful lives of the various classes of property are factors which may be fixed with substantial accuracy and this is true also as to the determination of the net salvage. These determinations should be reviewed from time to time and where there are changes in conditions or in the character of the plant which appear to be more than temporary so as to affect substantially these averages, corresponding adjustments should be made.

During the last ten years it has been part of my duty to study, continuously, the facts bearing upon these factors of useful life and net salvage, for use as a basis for revisions of charges to operating expenses and credits to account "Reserve for Accrued Depreciation" when changed conditions made same proper; and that the last such revision, made effective as of August 1, 1919, produced a reduction in the composite rate previously in effect, when applied to the present depreciable property in the State of New York, from 6.53% to 5.81%.

That in the contract made between the Postmaster General and the plaintiff in connection with the federal possession, control and operation of the plaintiff's property during the year from August, 1918, to August, 1919, the comparable composite rate for the charges to operating expenses and clearing accounts and credits to the account "Reserve for Accrued Depreciation" was fixed at 5.72%, except that the item of Right of Way, Account No. 207, was not included in this composite rate but was carried separately with a depreciation rate of 2.55%. This item is small and would not materially affect the said figure of 5.72%. This composite figure was applied to plaintiff's total depreciable property during the year of federal operation.

That upon the termination of federal operation on August 1, 1919, plaintiff put into effect the rates of depreciation shown
119 below and these rates have been continued in effect up to this time:

Depreciation Rates in Effect Since August 1, 1919.

212.	Buildings	2.6
	Cable, Aerial—	
242.	Exchange	7.0
252.	Toll	5.0
	Cable, Underground—	
245.	Exchange Main	3.0
245.	Exchange, Subsidiary	6.0
255.	Toll	2.8

	Cable, Submarine—	
246.	Exchange	8.0
256.	Toll	8.0
221.	Central Office Equipment	9.0
222.	Other Equipment of C. O	9.0
	Conduit, Underground—	
244.	Exchange, Main	2.0
244.	Exchange, Subsidiary	4.0
254.	Toll	2.0
261.	Office Furniture and Fixtures	10.0
	Pole Lines—	
241.	Exchange	9.0
251.	Toll	6.1
207.	Right of Way—	
	Exchange	6.0
	Toll	3.0
	Station Equipment—	
231.	Station Apparatus	6.0
232.	Station Installations	...
233.	Interior Block Wires	5.0
234.	Private Branch Exchanges	7.0
235.	Booths & Spl. Fittings	7.0
262.	General Shop Equipment	10.0
264.	General Stable and Garage Equipment	20.0
263.	General Store Equipment	10.0
265.	General Tools & Implements	20.0
	Wire, Aerial—	
243.	Exchange	9.6
253.	Toll	3.8

120 That the composite rate resulting from the application of the above specific rates was 5.82% for the year 1920 and 5.81% for the year 1921.

That under the regulations of the Interstate Commerce Commission plaintiff is required to file an annual report as of December 31st, showing, among other things, the composite rate of depreciation charged during the year. Plaintiff has so filed the composite rate so charged for each year.

That the amendment to Paragraph 5 of Section 20 of the Interstate Commerce Act, made by Section 435 of the Transportation Act, 1920, became effective on February 28, 1920, and that in the exercise of the authority vested in the Interstate Commerce Commis-

sion by said amendment to the interstate commerce act, on March 18, 1920, issued the following order:

"Interstate Commerce Commission,

Washington.

March 18, 1920.

"To all Carriers Concerned:

"Section 435 of the Transportation Act, 1920, contains the following provision:

"'The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carriers shall in any case include in any form under its operating or other
121 expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.'"

"Information received by the Commission indicates the existence of doubt as to the propriety of carriers making any charges to operating expenses with respect to depreciation prior to such time as the Commission shall prescribe the specific percentages of depreciation which shall be charged.

"The purpose of this circular is to dispel any such doubt as may exist in the minds of accounting officers.

"Until the Commission shall otherwise order, all carriers subject to the Act to regulate commerce should continue to observe the requirements respecting the accounting for depreciation which are embodied in the effective accounting classifications prescribed by the Commission for the respective classes of carriers.

GEORGE B. McGINTY,

Secretary."

That in order to carry out the provisions of said Section 20, as amended, the Interstate Commerce Commission organized a subdivision of its bureau of accounts, which is designated as the depreciation section, with Mr. Frank S. Fowler as chief for the purpose of aiding the commission in carrying out the provisions of said section as amended.

That for over a year last past, the said depreciation section has been conducting an investigation of the subject, preliminary to public hearings, which the commission has indicated its purpose to hold with reference to this matter. In connection with this investigation

Mr. Charles A. Heiss, Comptroller of the American Telephone and Telegraph Company, has been authorized to represent the Bell System companies, including the plaintiff, before the depreciation section.

122 That on January 6th, 1921, the said Mr. Fowler addressed to the said Mr. Heiss a letter, copy of which follows:

"Interstate Commerce Commission,

Bureau of Accounts,

Washington.

January 6, 1921.

"Mr. Charles A. Heiss,
Comptroller, American Telephone & Telegraph Co.,
195 Broadway, New York, New York.

DEAR SIR:

Section 20 of the Interstate Commerce Commerce Act, as amended February 28, 1920, requires the Interstate Commerce Commission to prescribe for carriers subject to the Act, the classes of property for which depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall be charged with respect to each of such classes of property.

"For the purpose of carrying out these requirements a preliminary investigation of the depreciation question is being conducted to secure all information possible to formulate recommendations which will be made public and fully considered at public hearings before the Commission takes the final steps required by the Act.

"In view of the magnitude of this subject and its paramount importance it is desired that all interested persons be given an opportunity to present their views and you are therefore requested to submit, with as little delay as possible, a statement or brief representing the opinion of your company with respect to the classes of depreciable property (by groups if practicable), the method of ascertaining the service life and salvage value, the bases upon which

123 depreciation charges should be accrued, the necessity for accruals, the relation of maintenance charges to depreciation and the manner in which the percentages of depreciation applicable to the several classes of property should be determined.

"It is also desired that you incorporate in the statement any suggestions or procedures which in your judgment will aid the Commission to reach a just and reasonable determination of the questions involved.

"It will be much appreciated if you will advise me of the approximate date your statement may be expected.

Yours very truly,

(Sgd.) FRANK S. FOWLER,
Chief of Depreciation Section."

That in response to this letter, Mr. Heiss wrote Mr. Fowler, under date of March 24th, 1921, setting forth in behalf of the Bell System the views, opinions and suggestions endorsed by those companies, responsive to the third and fourth paragraphs of the above letter.

That the rates put into effect on August 1, 1919, when the federal government surrendered the possession and control of plaintiff's property, as above set forth, have been maintained in effect pursuant to said order up to the present time.

That under date December 30, 1921, pursuant to the requirement of the Interstate Commerce Commission, plaintiff filed with said Commission the said specific rates of depreciation so put into effect on August 1, 1919.

That in the meantime the plaintiff has been, and it is now, cooperating with Mr. Heiss in an endeavor to furnish to the Intertsate Commerce Commission the data necessary to enable that Commission to prescribe, under the Act of Congress aforesaid, the classes
124 of plaintiff's property for which depreciation charges may properly be included under operating expenses and the percentage of depreciation which shall thereafter be charged by the plaintiff with respect to each class of property.

GEORGE W. WHITTEMORE.

Subscribed and sworn to before me this 29th day of March, 1922.

[SEAL.] LINCOLN JONES,
Notary Public,
Kings Co., No. 38.

Cert. Filed in N. Y. Co. No. 66.

125 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of Seymour L. Andrew.

STATE OF NEW YORK,
County of New York, ss:

I, Seymour L. Andrew, being duly sworn, on oath state:

That I am the Chief Statistician of the American Telephone and Telegraph Company and have been continuously engaged in statistical work for the said company for eleven years last past.

That as statistician I have charge of the work of compiling, analyzing and deducting statistical results from the facts which are available and are related to the telephone industry, so that these results may be utilized by the said company and by the associated companies of the Bell System in the transaction of their businesses.

That the chart attached hereto and identified as Exhibit A was prepared under my supervision and direction; that the said
126 chart is intended to show diagrammatically the trends of per station revenues of the New York Telephone Company, wholesale commodity prices, prices of telephone construction materials, general wages in New York City, and wages of the New York Telephone Company between January 1, 1895, and January 1, 1922; that the base to which the results shown by the chart are related is indicated by the line 00; that the years are indicated by the figures at the bottom of the chart; that for the years 1919 to 1921 inclusive a larger scale was adopted, so that the results might be shown by months as well as years; that the figures on the side of the diagram show the per cent of increase or decrease, as the case may be, from the condition existing in 1895 and indicated by the base line 00; that the words upon the chart in connection with the various curves shown upon it indicate what each of these lines represents.

That the curve showing the trend of wholesale commodity prices was made up from the figures compiled and published by the United States Bureau of Labor Statistics; the curve showing the trend of general wages in New York City is made up from data compiled and published by the United States Bureau of Labor Statistics and the New York State Department of Labor, the data of the New York State Department of Labor covering the later years and the data of the United States Bureau of Labor Statistics covering the former years, during which no such statistics were issued by the New York State Labor Department; that the curves showing the trend of wages of the New York Telephone Company and the trend of its average revenue per station are made up from the records and accounts of that company; that the curve showing the trend of telephone construction material prices is made up from the price records of the Western Electric Company, Incorporated, the largest manu-
127 facturer and seller of such material in the world and the source from which such material is obtained by the plaintiff, the New York Telephone Company. The curve last mentioned is based upon prices of representative items of finished material entering into the construction costs of telephone companies and covering a large proportion of such costs and, in my opinion, is fairly representative of telephone construction material prices.

That the attached diagram, Exhibit A, shows with substantial accuracy the trends during the period covered by it of the per station revenues of the plaintiff, the New York Telephone Company, the wholesale commodity prices, prices of telephone construction materials, general wages in New York City, and wages of the New York Telephone Company as these matters are shown by the data to which reference has been heretofore made.

Exhibit A attached to affidavit of Seymour L. Andrew.

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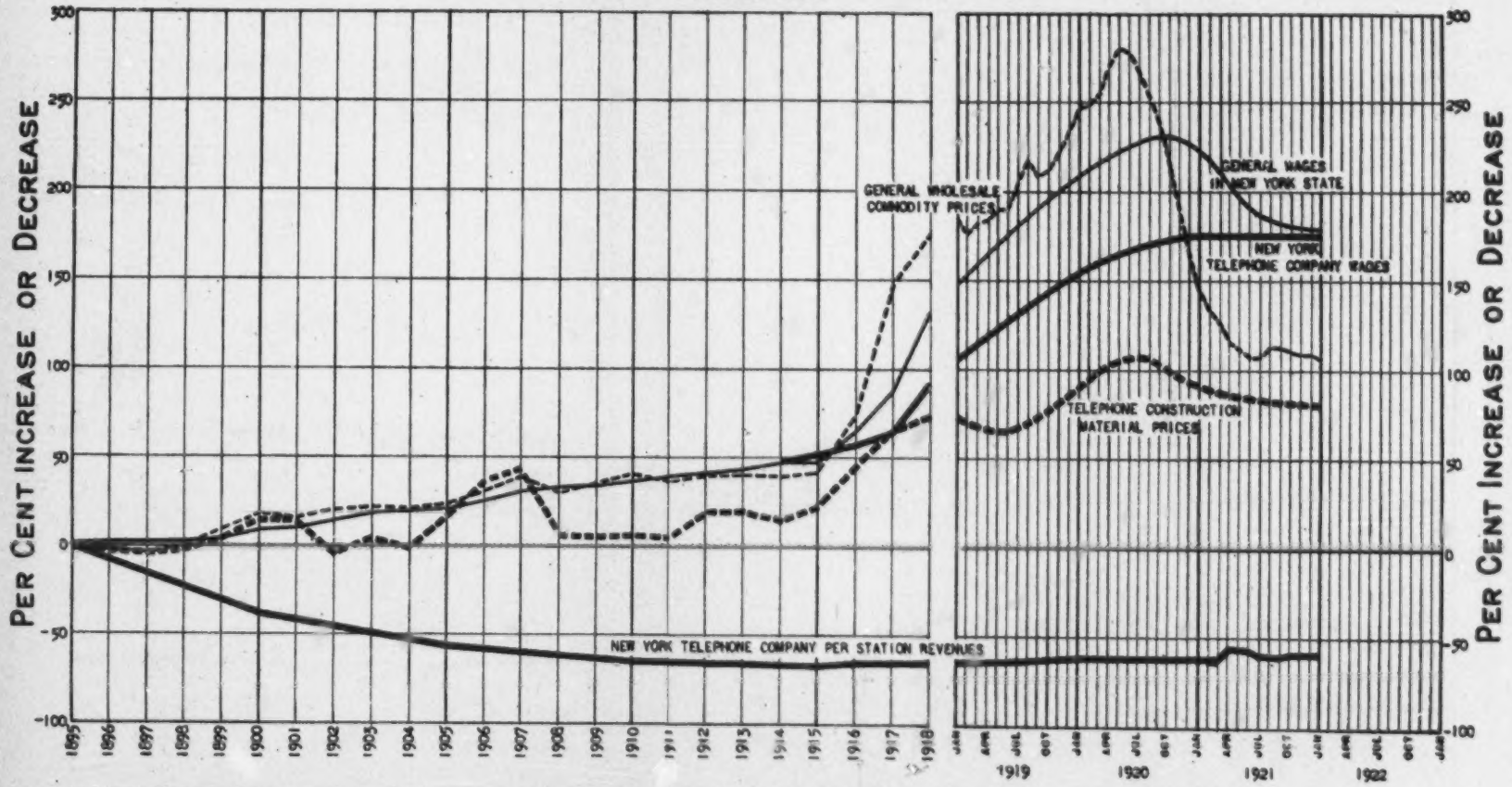
COMPARISON OF TRENDS IN PER STATION REVENUES OF NEW YORK TELEPHONE COMPANY, WHOLESALE COMMODITY PRICES, PRICES OF TELEPHONE CONSTRUCTION MATERIALS, GENERAL WAGES IN NEW YORK STATE AND WAGES OF NEW YORK TELEPHONE COMPANY SINCE 1895



NEW YORK TELEPHONE COMPANY PER STATION REVENUES - TREND OF AVERAGE EXCHANGE REVENUE PER STATION FOR NEW YORK TELEPHONE COMPANY AND ITS PREDECESSORS.

NEW YORK TELEPHONE COMPANY WAGES - TREND OF AVERAGE WAGE EARNINGS OF EMPLOYEES OF NEW YORK TELEPHONE COMPANY SINCE 1914; THE TREND PRIOR TO 1914 ASSUMED TO BE THE SAME AS THE TREND IN GENERAL WAGES.

TELEPHONE CONSTRUCTION MATERIAL PRICES - TREND OF AVERAGE PRICES OF REPRESENTATIVE ITEMS OF FINISHED MATERIAL ENTERING INTO THE CONSTRUCTION COSTS OF TELEPHONE COMPANIES; THE TREND PRIOR TO 1914 ASSUMED TO BE THE SAME AS THE TREND OF THE CORRESPONDING RAW MATERIALS

GENERAL WAGES IN NEW YORK STATE - TREND OF AVERAGE WAGE EARNINGS PER EMPLOYEE IN REPRESENTATIVE MANUFACTURING INDUSTRIES IN THE UNITED STATES UP TO 1914; IN NEW YORK STATE SINCE 1914.

GENERAL WHOLESALE COMMODITY PRICES TREND OF AVERAGE WHOLESALE PRICES OF ALL COMMODITIES FOR THE UNITED STATES.

ne curves on the chart have been constructed to show trends, and efore do not show the minor fluctuations indicated by the de- l statistics marked Exhibit B hereto, which are not significant spect of such trends.

nat attached hereto are the supporting figures obtained from the ces above stated, upon which the chart Exhibit A is based. Ex- B also contains more detailed information as to the sources which the said figures have been obtained and as to the manner eir use.

SEYMOUR L. ANDREW.

bscribed and sworn to before me this 29th day of March, 1922.
[SEAL.] H. W. HOLLSBERG,
Notary Public, Kings County.

rtificate Filed in New York County.
erk's No. 171, Register's No. 3174.
y Commission Expires March 30, 1923.

re follows chart on revenues, prices, and wages, marked page 128.)

129 Exhibit B attached to affidavit of Seymour L. Andrew.

Statistics represented diagrammatically by chart Exhibit A.

"Comparison of trends in per station revenues of New York Telephone Company, wholesale commodity prices, prices of telephone construction materials, general wages in New York State and wages of New York Telephone Company since 1895."

130 New York Telephone Company per Station Revenues.

Column "A" shows the average monthly exchange revenue per station for each year from 1895 to 1918, both inclusive, and for each of the months of 1919, 1920 and 1921. The data cover the operations of the New York Telephone Company and its predecessors in substantially the territory now operated by the New York Telephone Company, as shown by the accounts and records of these companies.

Column "B" shows the per cent decrease over 195.

	Column A.	Column B.
1895	$9.35	....
1896	8.55	— 8.6
1897	7.68	—17.9
1898	7.10	—24.1
1899	6.28	—32.8
1900	5.80	—37.9
1901	5.49	—41.3
1902	5.07	—45.8
1903	4.78	—48.9
1904	4.52	—51.6
1905	3.98	—57.4
1906	3.53	—62.2
1907	3.48	—62.8
1908	3.37	—63.9
1909	3.37	—63.9
1910	3.40	—63.6
1911	3.31	—64.6
1912	3.27	—65.0
1913	3.20	—65.7
1914	2.99	—68.0
1915	2.97	—62.2
1916	3.16	—66.2
1917	3.20	—65.7
1918	3.16	—66.1
1919—January	3.21	—65.6
February	3.21	—65.6
March	3.24	—65.3
April	3.27	—65.0

	Column A.	Column B.
1919—May	3.31	—64.6
June	3.28	—64.9
July	3.38	—63.9
August	3.29	—64.8
September	3.35	—64.1
October	3.40	—63.6
November	3.34	—64.2
December	3.46	—63.0
1920—January	3.59	—61.6
February	3.52	—62.3
March	3.60	—61.4
April	3.56	—61.9
May	3.56	—61.9
June	3.58	—61.7
July	3.54	—62.1
August	3.47	—62.8
September	3.64	—61.0
October	3.68	—60.6
November	3.68	—60.6
December	3.71	—60.3
1921—January	3.67	—60.7
February	3.60	—61.5
March	3.67	—60.8
April	4.22	—54.9
May	4.14	—55.7
June	4.06	—56.5
July	3.84	—58.9
August	3.77	—59.6
September	3.78	—59.6
October	3.85	—58.8
November	3.87	—58.6
December	3.69	—60.6

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132 General Wholesale Commodity Prices.

The figures in Column "A" for the year- 1895 to 1913, inclusive, are from Bulletin No. 173 of the United States Bureau of Labor Statistics, "Index Numbers of Wholesale Prices in the United States and Foreign Countries," page 126, and represent, for "All Commodities," a weighted annual index of wholesale prices for the United States based on average prices during the period 1890 to 1899. The figures for the years 1913 to 1918, inclusive, and for the years 1919, 1920, and 1921 by months, in Column "B," are from various issues of the Monthly Labor Review published by the U. S. Bureau of Labor Statistics, and represent substantially the same index as for 1895 to 1913, continued beyond 1913 but based on average prices in

the year 1913 instead of on average prices during the period 1890 to 1899.

In Column "C," the data of Columns "A" and "B" have been combined into a continuous series based upon the year 1895. (In this process the slight error mentioned by the Bureau of Labor Statistics on pages 43 and 44 of Bulletin No. 173 has been corrected.)

The figures in Column "D" represent the per cent increase or decrease in the index number for each year or month, as compared with 1895.

	Column A.	Column B.	Column C.	Column D.
1895	93.6	...	100.0	.....
1896	90.4	...	96.6	— 3.4
1897	89.7	...	95.8	— 4.2
1898	93.4	...	99.9	— 0.1
1899	101.7	...	108.7	+ 8.7
1900	110.5	...	118.1	+ 18.1
1901	108.5	...	115.8	+ 15.8
1902	112.9	...	120.5	+ 20.4
1903	113.6	...	121.4	+ 21.4
1904	113.0	...	120.9	+ 20.9
1905	115.9	...	123.8	+ 23.8
1906	122.5	...	131.0	+ 31.0
133				
1907	129.5	...	138.2	+ 38.2
1908	122.8	...	130.4	+ 30.4
1909	126.5	...	134.6	+ 34.6
1910	131.6	...	139.5	+ 39.5
1911	129.2	...	135.6	+ 35.6
1912	133.6	...	139.5	+ 39.5
1913	135.2	100	140.1	+ 40.1
1914	.....	100	138.7	+ 38.7
1915	.....	101	141.5	+ 41.5
1916	.....	124	173.7	+ 73.7
1917	.....	176	246.5	+146.5
1918	.....	196	274.5	+174.5
1919—January	.....	203	284.3	+184.3
February	.....	197	275.9	+175.9
March	.....	201	281.5	+181.5
April	.....	203	284.3	+184.3
May	.....	207	289.9	+189.9
June	.....	207	289.9	+189.9
July	.....	218	305.3	+205.3
August	.....	226	316.5	+216.5
September	.....	220	308.0	+208.0
October	.....	223	312.3	+212.3
November	.....	230	322.1	+222.1
December	.....	238	333.3	+233.3

	Column A.	Column B.	Column C.	Column D.
1920—January		248	347.3	+247.3
February		248	348.7	+248.7
March		253	354.3	+254.3
April		265	371.1	+271.1
May		272	381.0	+281.0
June		269	376.8	+276.8
July		262	366.9	+266.9
August		250	350.1	+250.1
September		242	338.9	+238.9
October		225	315.1	+215.1
November		207	289.9	+189.9
December		189	264.7	+164.7
1921—January		177	247.9	+147.9
February		167	233.9	+133.9
March		162	226.9	+126.9
April		154	215.7	+115.7
May		151	211.6	+111.6
June		148	207.3	+107.3
July		148	207.3	+107.3
August		152	212.9	+112.9
September		152	212.9	+112.9
October		150	210.1	+110.1
November		149	208.7	+108.7
December		149	208.7	+108.7

134 Telephone Construction Material Prices.

For the years 1914 to 1921, both inclusive, the figures in Column "A" represent a weighted average annual index number, based on 1914, of the prices to Associated Bell Companies of important representative items of finished material entering into telephone construction costs, these index numbers being prepared from price records maintained by the Western Electric Company, Incorporated.

These data not being available for years prior to 1914, the trend from 1895 to 1914, shown on the chart, represents the trend of the market prices of the raw materials entering into the finished materials mentioned above; and the figures in Column "B" represent a weighted annual index number of such raw material prices for those years, based on the year 1895.

The figures in Column "C" represent a recomputation of the figures for the years 1914 to 1921, inclusive, in Column "A" to a base of 1895 instead of 1914.

The figures in Column "D" represent the per cent increase or decrease in the annual index number for each year, as compared with 1895.

For the years 1919, 1920 and 1921, exact data by months were not available. The curve on the chart has been smoothed to indicate the monthly trend during these three years on the basis of the movement of the prices of approximately similar materials.

135

	Column A.	Column B.	Column C.	Column D.
1895	.....	100.0	.....	.....
1896	.....	94.3	.....	— 5.7
1897	.....	95.7	.....	— 4.3
1898	.....	98.6	.....	— 1.4
1899	.....	105.7	.....	+ 5.7
1900	.....	114.3	.....	+ 14.3
1901	.....	112.8	.....	+ 12.8
1902	.....	96.3	.....	— 3.7
1903	.....	102.8	.....	+ 2.8
1904	.....	98.9	.....	— 1.1
1905	.....	115.3	.....	+ 15.3
1906	.....	136.1	.....	+ 36.1
1907	.....	142.1	.....	+ 42.1
1908	.....	106.3	.....	+ 6.8
1909	.....	104.6	.....	+ 4.6
1910	.....	106.6	.....	+ 6.6
1911	.....	103.5	.....	+ 3.5
1912	.....	118.5	.....	+ 18.5
1913	.....	119.2	.....	+ 19.2
1914	100.0	115.0	115.0	+ 15.0
1915	106.1	.....	122.0	+ 22.0
1916	127.3	.....	146.4	+ 46.4
1917	143.8	.....	165.4	+ 65.4
1918	150.2	.....	172.7	+ 72.7
1919	150.2	.....	172.7	+ 72.7
1920	174.7	.....	200.9	+100.9
1921	160.8	.....	184.9	+ 84.9

136 General Wages in New York State.

The figures in Column "A" for the years 1895 to 1907, inclusive, are from Bulletin No. 77 of the U. S. Bureau of Labor Statistics, "Wages and Hours of Labor in Manufacturing Industries 1890 to 1907," page 7, and represent an annual index number of wages per hour in representative industries in the United States based on average wages per hour during the period 1890–1899. The figures in Column "B" for the years 1907 to 1915, inclusive, are from Bulletin No. 194 of the United States Bureau of Labor Statistics, "Union Scale of Wages and Hours of Labor," page 21, and represent an annual index number of rates of wages per full time week in representative industries based on rates of wages in 1907. The figures in Column "C" for the years 1915 to 1918, inclusive, and for the months of 1919, 1920, 1921 are from The Industrial Bulletin published by the Industrial Commissioner of New York State, and represent average weekly earnings in representative industrial establishments in New York State.

In Column "D" the data of Columns "A," "B" and "C" have been combined into a continuous series based upon the year 1895.

The figures in Column "E" represent the per cent increase or decrease in the index number for each year or month, as compared with 1895.

The curve for the years 1919, 1920 and 1921, as shown on the chart, has been smoothed to represent the general trend of the data.

	Column A.	Column B.	Column C.	Column D.	Column E.
1895	98.3	...	.....	100.0	.....
1896	99.7	...	.....	101.4	+1.4
1897	99.6	...	.....	101.3	+1.3
1898	100.2	...	.....	101.9	+1.9
1899	102.0	...	.....	103.8	+3.8
1900	105.5	...	.....	107.3	+7.3
1901	108.0	...	.....	109.9	+9.9
1902	112.2	...	.....	114.4	+14.4
1903	116.3	...	.....	118.3	+18.3
1904	117.0	...	.....	119.0	+19.0
1905	118.9	...	.....	121.0	+21.0
1906	124.2	...	.....	126.3	+26.3
1907	128.8	100	.....	131.0	+31.0
1908	.....	101	.....	132.3	+32.3
1909	.....	102	.....	133.6	+33.6
1910	.....	104	.....	136.2	+36.2
1911	.....	105	.....	137.6	+37.6
1912	.....	107	.....	140.2	+40.2
1913	.....	109	.....	142.8	+42.8
1914	.....	111	.....	145.4	+45.4
1915	.....	112	$12.85	146.7	+46.7
1916	.....	...	14.43	1[illegible]4.7	+64.7
1917	.....	...	16.37	186.9	+86.9
1918	.....	...	20.35	232.3	+132.3
1919—January	.....	...	23.03	262.9	+162.9
February	.....	...	22.07	252.0	+152.0
March	.....	...	22.20	253.4	+153.4
April	.....	...	22.11	252.4	+152.4
May	.....	...	22.23	253.8	+153.8
June	.....	...	22.51	257.0	+157.0
July	.....	...	23.10	263.7	+163.7
August	.....	...	23.85	272.3	+172.3
September	.....	...	24.83	283.5	+183.5
October	.....	...	24.41	278.7	+178.7
November	.....	...	25.37	289.6	+189.6
December	.....	...	26.32	300.5	+200.5
1920—January	.....	...	26.52	302.8	+202.8
February	.....	...	26.47	302.2	+202.2
March	.....	...	27.87	318.2	+218.2
April	.....	...	27.80	317.4	+217.4
May	.....	...	28.45	324.8	+224.8

	Column A.	Column B.	Column C.	Column D.	Column E.
1921—June	.....	...	28.77	328.4	+228.4
July	.....	...	28.49	325.2	+225.2
August	.....	...	28.71	327.8	+227.8
September	.....	...	28.73	328.0	+228.0
October	.....	...	28.93	330.3	+230.3
November	.....	...	28.70	327.6	+227.6
December	.....	...	28.35	323.6	+223.6
1921—January	.....	...	27.61	315.2	+215.2
February	.....	...	26.77	305.6	+205.6
March	.....	...	26.97	307.9	+207.9
April	.....	...	26.20	299.1	+199.1
May	.....	...	25.86	295.2	+195.2
June	.....	...	25.71	293.5	+193.5
July	.....	...	25.26	288.4	+188.4
August	.....	...	25.43	290.3	+190.3
September	.....	...	25.07	286.2	+186.2
October	.....	...	24.53	280.0	+180.0
November	.....	...	24.32	277.6	+177.6
December	.....	...	24.91	284.4	+184.4

138 New York Telephone Company Wages.

From 1914 to 1921, data are available showing the average monthly wage earnings of all employees of the New York Telephone Company, and these are shown in Column "A."

For the period from 1895 to 1914, similar data are not available, but data as to general wages are available (see under "General Wages in New York State"), and these data on general wages have been assumed to indicate the trend of New York Telephone Company wages during that period. The figures in Columns "D" and "E" under "General Wages in New York State" have, therefore, been repeated in Columns "B" and "C" hereunder, for 1895 to 1914, and continued for the years 1914 to 1921, inclusive, on the basis of the New York Telephone Company data in Column "A." The final figures in Column "C" represent the per cent increase for each year or month, as compared with 1895.

The curve for the years 1919, 1920 and 1921, as shown on the chart, has been smoothed to represent the general trend of the data.

	Column A.	Column B.	Column C.
1895	.....	100.0	.....
1896	.....	101.4	+1.4
1897	.....	101.3	+1.3
1898	.....	101.9	+1.9
1899	.....	103.8	+3.8
1900	.....	107.3	+7.3
1901	.....	109.9	+9.9
1902	.....	114.4	+14.4

	Column A.	Column B.	Column C.
1903	.....	118.3	+18.3
1904	.....	119.0	+19.0
1905	.....	121.0	+21.0
1906	.....	126.3	+26.3
1907	.....	131.0	+31.0
1908	.....	132.3	+32.3
1909	.....	133.6	+33.6
1910	.....	136.2	+36.2
1911	.....	137.6	+37.6
139 & 140			
1912	.....	140.2	+40.2
1913	.....	142.8	+42.8
1914	$60.66	145.4	+45.4
1915	62.75	151.0	+51.0
1916	65.90	156.5	+56.5
1917	68.17	164.1	+64.1
1918	79.83	192.2	+92.2
1919—January	92.54	227.7	+122.7
February	85.49	205.8	+105.8
March	90.84	218.7	+118.7
April	89.37	215.1	+115.1
May	94.82	228.2	+128.2
June	90.44	217.7	+117.7
July	98.71	237.6	+137.6
August	95.19	229.1	+129.1
September	95.07	228.8	+128.8
October	105.35	253.6	+153.6
November	100.89	242.8	+142.8
December	105.33	253.5	+153.5
1920—January	103.21	248.4	+148.4
February	101.91	245.3	+145.3
March	110.83	266.8	+166.8
April	109.17	262.8	+162.8
May	112.50	270.8	+170.8
June	110.39	265.7	+165.7
July	111.96	269.5	+169.5
August	108.01	260.0	+160.0
September	108.02	260.0	+160.0
October	111.24	267.8	+167.8
November	109.76	264.4	+164.4
December	111.27	267.8	+167.8
1921—January	109.76	264.2	+164.2
February	102.46	[illegible]6	+146.6
March	109.81	[illegible]	+164.3
April	110.52	266.0	+166.0
May	113.30	272.7	+172.7
June	111.78	269.1	+169.1
July	113.60	273.4	+173.4

	Column A.	Column B.	Column C.
1921—August	113.43	273.0	+173.0
September	111.77	269.0	+169.0
October	115.90	279.0	+179.0
November	116.84	281.2	+181.2
December	117.68	283.3	+183.3

141 *Temporary Restraining Order.*

District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST, WILLIAM R. POOLEY, CHARLES VAN Voorhis, Oliver C. Semple, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission; and Charles D. Newton, Attorney General of the State of New York, Defendants.

This day came New York Telephone Company, by Charles T. Russell, and Stetson, Jennings and Russell, its Solicitors, and moved the Court for a temporary restraining order in accordance with the prayer of its bill of complaint filed on the 29th day of March, 1922, restraining and enjoining the defendants therein named and each of them from any attempt to compel the plaintiff, its officers, agents and employees, to observe or put in force on April 1, 1922, or to observe or keep in force thereafter, the rates for telephone service prescribed by the orders made by the Public Service Commission of the State of New York on March 3, 1922, as set forth in said bill of complaint or either of said orders, and further, to restrain and enjoin the said defendants and each of them from taking any steps or proceedings against the plaintiff, its officers, agents or employees, to enforce any penalties or any other remedy for disregarding the rates prescribed by the said orders or either of them, and in support of its said motion plaintiff tendered to the Court the several affidavits of James A. Stewart, Jacob S. Wiley, Halbert P. Gillette, Frankland Briggs,
142 Arthur D. Welch, George W. Whittemore (2), Seymour L. Andrew and Andrew Sangster, all verified on the 29th day of March, 1922, and the affidavit of Harry M. Addinsell, verified on the 30th day of March, 1922, and it appearing to the Court that under the orders of said Public Service Commission complained of in the said bill of complaint, the rates therein prescribed are directed to be put into effect on the first day of April, 1922, and that great and irreparable injury would in such event result

therefrom to the plaintiff if the said orders or either of them should be hereafter held to be void, and the Court having heard counsel for the plaintiff in support of its motion, and counsel for all of the defendants in opposition thereto, it is ordered and decreed, that the defendants William A. Prendergast, William R. Pooley, Charles Van Voorhis, Oliver C. Semple, Charles G. Blakeslee, the persons constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission; and Charles D. Newton, Attorney General of the State of New York, be and they are hereby severally enjoined and restrained until the further order of the Court from attempting to compel the plaintiff, its officers, agents and employees, to observe or put in force on April 1, 1922, or to observe and keep in force thereafter, the rates for telephone service prescribed by the said orders of March 3, 1922, set forth in said bill or either of them, and that the defendants be and they are hereby enjoined and restrained until the further order of the Court from taking any steps or proceedings against the plaintiff, its officers, agents or employees, to enforce any penalties or any other remedy against the plaintiff for disregarding the rates prescribed by said orders or either of them.

This order shall not take effect until the plaintiff shall enter into a bond or undertaking with good security in the sum of
143 Twenty-five thousand dollars ($25,000) before the Clerk of this Court, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained hereby, and further conditioned so that in the event that a preliminary injunction as prayed for in the said bill of complaint shall not be awarded to the plaintiff upon or before the expiration of this order, the plaintiff shall refund to its several subscribers, either in cash or by credit upon subsequent bills, any sums paid by them in the meantime in excess of the sums chargeable to them pursuant to the provisions of said orders of the Public Service Commission, the enforcement of which is hereby temporarily enjoined.

And the plaintiff having moved this Court for the issuance of a preliminary injunction in accordance with the prayer set forth in its said bill of complaint, it is further ordered that the hearing of such motion be set for the eighth day of April, 1922, at 10:30 o'clock A. M., in Room 235 in the Post Office Building, New York City, and that not less than five days' notice thereof be given to the defendants herein and to the Governor of the State of New York, and I hereby call to my assistance at the hearing of said motion the Honorable Charles M. Hough, a Circuit Judge of this Circuit, and the Honorable John C. Knox, a District Judge of this District.

Dated at New York, N. Y., this 30th day of March, 1922.

AUGUSTUS N. HAND,
Judge of the United States District Court
for the Southern District of New York.

Endorsed: U. S. District Court, S. D. of N. Y. Filed March 31, 1922.

144 *Notice of Hearing on Motion for Preliminary Injunction.*

District Court of the United States, Southern District of New York.

In Equity.

No. 23—252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST, WILLIAM R. POOLEY, CHARLES VAN Voorhis, Oliver C. Semple, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission; and Charles D. Newton, Attorney General of the State of New York, Defendants.

To:

Hon. Nathan L. Miller, Governor of the State of New York;

Hon. Charles D. Newton, Attorney General of the State of New York;

Hon. William A. Prendergast, Hon. William R. Pooley, Hon. Charles Van Voorhis, Hon. Oliver C. Semple, Hon. Charles G. Blakeslee, the persons constituting the Public Service Commission of the State of New York; and

Hon. Ledyard P. Hale, Counsel to said Public Service Commission.

You and each of you are hereby notified that the New York Telephone Company, the plaintiff above named, has filed its verified bill of complaint, supported by affidavits, in the District Court of the United States for the Southern District of New York, against William A. Prendergast, William R. Pooley, Charles Van Voorhis, Oliver C. Semple, Charles G. Blakeslee, the persons constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission; and Charles D. Newton, Attorney General of the State of New York, praying that the

145 orders of the Public Service Commission of the State of New York made on the 3rd day of March, 1922, prescribing certain telephone rates to be charged by the plaintiff for its service in the State of New York be decreed to be void and that the enforcement of such orders by the Public Service Commission of the State of New York and its Counsel and the Attorney General of said State be temporarily and permanently restrained and enjoined from any attempt to compel the plaintiff, its officers, agents and employes, to observe or put in force on April 1, 1922, or to observe or keep in force thereafter, the rates for telephone service prescribed by the orders made by the Public Service Commission for the State of New York on March 3, 1922, as set forth in its said bill of complaint herein, or

either of said orders, and further, to restrain and enjoin the said defendants, and each of them, from taking any steps or proceedings against the plaintiff, its officers, agents or employees, to enforce any penalties or any other remedy for disregarding the rates prescribed in said orders, or either of them.

In such suit plaintiff has moved for a preliminary injunction to be in effect during the pendency of the suit enjoining the said defendants in accordance with the prayer set forth in its said bill of complaint as aforesaid.

The motion for such preliminary injunction will be heard in Room 235 of the Post Office Building, New York City on the 8th day of April, 1922, at 10:30 o'clock a. m., by the Honorable Augustus N. Hand, District Judge, and the Honorable Charles M. Hough, Circuit Judge, and the Honorable John C. Knox, District Judge, called by Honorable Augustus N. Hand to assist him at
146 the hearing thereof, in accordance with the provisions of the preliminary restraining order granted herein on the 30th day of March, 1922.

Dated, New York, N. Y., March 31, 1922.

CHARLES T. RUSSELL,
STETSON, JENNINGS AND RUSSELL,
Solicitors for Plaintiff.

Service of the above notice is accepted this 1st day of April, 1922.

CHARLES D. NEWTON,
Attorney General of the State of New York.
By B. F. STURGIS,
Deputy.

Service upon all the defendants in the above suit, other than Charles D. Newton, Attorney General of the State of New York, of the above notice is accepted this 31st day of March, 1922.

LEDYARD P. HALE,
Counsel and Solicitor for Said Defendants.

Copy received April 1, 1922.

NATHAN L. MILLER,
By WM. G. McCARTHY.

147 & 148 United States District Court, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST, WILLIAM R. POOLEY, CHARLES VAN Voorhis, Oliver C. Semple, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission, and Charles D. Newton, Attorney General of the State of New York, Defendants.

Answer to Bill of Complaint and Affidavits in Opposition to Application for Interlocutory Injunction.

Ledyard P. Hale, Solicitor for Defendants, 91 State Street, Albany, N. Y.

U. S. District Court. S. D. of N. Y. Filed May 22, 1922. Recd. Apl. 20/22.

149 United States District Court Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST, WILLIAM R. POOLEY, CHARLES VAN Voorhis, Oliver C. Semple, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission, and Charles D. Newton, Attorney General of the State of New York, Defendants.

The answer of William A. Prendergast, William R. Pooley, Charles Van Voorhis, Oliver C. Semple, and Charles G. Blakeslee, the persons constituting the public service commission of the State of New York, and of Ledyard P. Hale, as counsel to said public service commission, shows:

I.

1. These defendants admit the allegations of paragraph one of the bill of complaint.

150 2. These defendants admit the allegations of paragraph two of the bill of complaint.

3. These defendants admit the allegations of paragraph three of the bill of complaint, except that these defendants deny each and every averment therein that the orders of the defendant Public Service Commission therein referred to are, or that either of them is, confiscatory of plaintiff's property, or that they seek or that either of them seeks to deprive plaintiff of its property without due process of law or to deny to plaintiff the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

4. These defendants admit the allegations of paragraph four of the bill of complaint that orders were made as therein alleged, but these defendants deny that determinations were made as alleged in said paragraph but refer to said orders for the determinations of said Public Service Commission.

5. These defendants admit the allegations of paragraph five of the bill of complaint.

6. These defendants admit the allegations of paragraph six of the bill of complaint, except that defendants allege that by said orders of March 3, 1922, no change in plaintiff's existing rates for toll service were made.

7. As to the allegations of paragraph seven of the bill of complaint, these defendants on information and belief deny that the present cost of reproduction of said property as it existed on or about January 31, 1922, is the sum of $373,000,000 or that the present fair and reasonable value of said property is in excess of the sum of $323,000,000; and on the contrary they allege on information
151 and belief that the present cost of reproduction of said property as it existed on or about January 31, 1922, is materially less than said sum of $373,000,000 and that the present fair and reasonable value of said property is materially less than the sum of $323,000,000 and is materially less than the sum of $247,435,925, the alleged cost thereof to plaintiff.

8. These defendants deny that plaintiff's telephone business in the State of New York has been conducted efficiently or economically during any of the times referred to in plaintiff's bill of complaint. These defendants allege on information and belief that plaintiff's net earnings referred to in paragraph eight of the bill of complaint are matters of conclusions from facts rather than matters of fact capable of exact statement; and said defendants on information and belief deny that plaintiff's net earnings derived from its intrastate telephone business within the State of New York are the sums respectively set forth in paragraph eight; but on the contrary they allege on information and belief that said net returns properly computed are much larger than as stated in plaintiff's bill of complaint,

and will amount under said orders of March 31, 1922, to a fair and reasonable return.

These defendants on information and belief deny that the fair and reasonable value of plaintiff's property used or useful in furnishing intrastate telephone service within the State of New York is substantially or any in excess of its cost.

9. These defendants on information and belief deny that the plaintiff is entitled as matter of law to earn under rates imposed
152 upon it by the defendant Commission an amount equal to not less than eight per cent of the fair and reasonable value of its property used or useful in the rendition of the service covered by the rates in question.

10. These defendants deny on information and belief the allegation of paragraph ten of the bill of complaint that exchange rates afford plaintiff more than eighty per cent of its revenue from telephone business in this state.

That as to the other allegations of paragraph ten of the bill of complaint said defendants deny that during the years 1919, 1920, 1921 and the month of January, 1922, plaintiff's rates were not compensatory or were less than just and reasonable rates; but on the contrary said defendants allege on information and belief that said rates for said period were compensatory, just and reasonable.

11. These defendants on information and belief deny all of the allegations of paragraph eleven of the bill of complaint; and on information and belief allege that if plaintiff shall practice all reasonable economies consistent with adequate and efficient service to the public the financial result will be a fair and reasonable return to plaintiff.

12. These defendants on information and belief deny that the provision of the order of defendant Commission, Exhibit E, requiring the execution and delivery of a bond or undertaking, deprives the plaintiff of an opportunity to have a judicial determination as to the legality of the rates which may be finally prescribed by the defendant Commission, whether said rates be finally sustained as legal or not, or that said order on that account seeks to or will deprive the plaintiff of its property without due process of law or deny
153 to the plaintiff the equal protection of the laws under the Fourteenth Amendment.

13. As to the allegations of paragraph 13 of the bill of complaint, these defendants deny that, unless defendants are restrained or enjoined, the plaintiff or any one on its behalf, by any attempt of these defendants to compel compliance with said orders or to enforce penalties or otherwise, will be forced to submit to confiscation of plaintiff's property without due process of law or in violation of plaintiff's rights under the constitution of the United States or will be subjected to great or irreparable loss or damage, and these defendants deny that the plaintiff has no plain, speedy or adequate remedy at law.

II.

Further answering as a defense to said bill of complaint, these defendants allege:

14. The orders of March 3, 1922, described in the bill of complaint as Exhibits E and F of said Public Service Commission are not final orders; they are interlocutory orders made by the Commission under authority of law in legal proceedings duly pending and uncompleted before the Commission, for the determination of controversial questions committed by law to the Commission for determination. The determination among other things requires oral examination and cross-examination of expert witnesses and expert analysis of complicated documents presented to the Commission by the plaintiff and others as exhibits in such proceedings. Errors of the Commission if committed in either of said preliminary orders are under express provision of the statute of the State of New York open
154 to correction by the Commission on the plaintiff's application to the Commission for a rehearing, and no such application as to either of such orders has ever been made.

15. At all times in the complaint mentioned plaintiff was and is a corporation created under the laws of the State of New York owning, operating and managing a telephone line including poles, wires, apparatus and property used in the conduct of the business of affording telephonic communication for hire within the State of New York, and having property within such state of a value exceeding $10,000. Of these defendants, the members of and constituting the Public Service Commission of said state, at all such times since April 25, 1921, have been and now are a public body created under the Public Service Commission Law of the State of New York as amended by chapter 134 and chapter 335 of the laws of 1921.

16. In and by said law the said Commission is given and now has authority and it is its duty among other things, after a hearing, if in the opinion of the Commission, rates and rentals charged or collected by the plaintiff are unjust and unreasonable, to determine the just and reasonable rates and rentals to be enforced as the maximum to be charged and collected for the performance of service by the plaintiff in the transmission of messages or communications by telephone and for the rental or use of any telephone appliances or devices within the State of New York, and pending the final determination of the rate charged for rental to be thereafter demanded or collected by the plaintiff to authorize an immediate reasonable temporary increase or decrease in the plaintiff's rate, charge or
155 rental within the State of New York if it shall be made to appear to the satisfaction of the Commission that the public interest requires a change in the rate charged or that such change is necessary for the purpose of providing adequate service or for the preservation of the property. In and by said Public Service Commission Law it is and ever since 1907 has been provided that after

an order is made by the Commission, any corporation or person interested therein shall have the right to apply for a rehearing as to any matter determined therein, and that the Commission shall grant and hold such rehearing if in its judgment sufficient reason therefor be made to appear, and that if after such rehearing and a consideration of the facts, including those arising since the making of the order, the Commission shall be of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, the Commission may abrogate or change the same.

17. In proceedings instituted and pending before the Public Service Commission, Second District, under authority of said Public Service Commission Law prior to the amendments thereof of 1921 affecting telephone rates within the City of New York, that Commission made the orders described in the bill of complaint, paragraph IV. namely, Exhibit A, November 30, 1915, Exhibit B, September 16, 1919, as final orders in those proceedings, and made Exhibit C on March 17, 1921, in a proceeding then pending before said Commission undetermined. When the present Commission, April 25, 1921, succeeded that former Commission the proceeding last named was pending undetermined and has been continued and is now going on unfinished before the present Commission, and this Commission under authority of said law as amended by said chapters of
153 the laws of 1921 made in said unfinished proceeding the orders establishing for the plaintiff the temporary rates within the city of New York pending the final determination of said proceeding which orders are described in the complaint as Exhibit D, June 16, 1921, as amended by the order described in the complaint as Exhibit E, March 3, 1922.

18. In addition to the said uncompleted proceeding of the Public Service Commission, Second District, as to rates in the city of New York, this present Commission under authority of said law as amended in 1921 by an order adopted November 10, 1921, entered upon a hearing upon its own motion as to the rates and rentals of the plaintiff throughout its service in the State of New York to the end that if required under the evidence presented the Commission should determine for the entire territory served by the plaintiff within the state the just, reasonable maximum rates to be charged by the plaintiff therein for its service. This proceeding has ever since said November 29, 1921, been going on before the Commission and is still pending undetermined. In such proceeding the Commission made the order for temporary rates pending the final determination of such proceeding which is described as Exhibit F attached to the bill of complaint. Exhibit F in that proceeding and Exhibit E in the New York City case instituted before the Public Service Commission, Second District, and now pending before this Commission undetermined as aforesaid, cover the plaintiff's entire territory within the State of New York and authorize temporary rates pending final determination in such proceedings of the matters there in question.

157 In the hearing of these two cases now going on before the Commission as aforesaid and yet undetermined, all the controversial problems of expert opinion and expert testimony presented in this suit are at this moment under examination by this Commission created by law for that purpose aided by state officials and employees chosen as experts to the end that the investigation thereof shall be completely made and the determination thereof fairly and justly established. Witnesses for the plaintiff are now under examination therein as well as witnesses on behalf of users of the plaintiff's service. Scores of exhibits presented for the plaintiff and others for the users of such service have been received and are under analysis in aid of a decision in such cases by this Commission as the public authority created by law for this purpose so far as the rates of the plaintiff for service within the State of New York are in question.

Pending such final determination in these cases the temporary rates authorized by said orders of the Commission of March 3, 1922, described in the complaint as Exhibits E and F have been made by this Commission under the authority of the Public Service Commission Law as amended by said chapters of the laws of 1921. The plaintiff has never applied to this Commission asking for a rehearing as to either of said orders or any portions of either thereof. These defendants accordingly submit to the Court that the plaintiff has a full, adequate and complete remedy at law which is both plain, speedy and efficient for the correction of errors if any exist in either of said orders.

Wherefore, these defendants, having fully answered all the matters in the bill of complaint herein material to be answered ac-
158 cording to their best knowledge and belief, humbly pray this Honorable Court to enter its judgment that the said defendants be hence dismissed with their reasonable costs and charges; and said defendants humbly pray for such other relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

[L. S.] PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
By WILLIAM A. PRENDERGAST,
Chairman.

WILLIAM A. PRENDERGAST.
WILLIAM R. POOLEY.
CHARLES VAN VOORHIS.
OLIVER C. SEMPLE.
CHARLES G. BLAKESLEE.
LEDYARD P. HALE.

Attest:
FRANCIS E. ROBERTS, *Secretary.*

LEDYARD P. HALE,
Solicitor for said Defendants.

91 State Street, Albany, N. Y.

UNITED STATES OF AMERICA,
State of New York,
County of Albany, ss:

On this sixth day of April, 1922, before me personally appeared William A. Prendergast, William R. Pooley, Charles Van Voorhis, Oliver C. Semple, and Charles G. Blakeslee, who each being by me first duly sworn each of them deposes and says that he is one
159 of the defendants in the above entitled action, that he has read the foregoing answer by him subscribed and knows the contents thereof, and that the same is true of his knowledge, except as to those matter- therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

(Signed) WILLIAM A. PRENDERGAST.
WILLIAM R. POOLEY.
CHARLES VAN VOORHIS.
OLIVER C. SEMPLE.
CHARLES G. BLAKESLEE.

Severally subscribed and sworn to before me this 6th day of April, 1922.

SHERMAN C. WARD,
Notary Public, Monroe County, New York.

Certificate filed in Albany County.

160 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST, WILLIAM R. POOLEY, CHARLES VAN Voorhis, Oliver C. Semple, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission, and Charles D. Newton, Attorney General of the State of New York.

STATE OF NEW YORK,
County of New York,
City of New York, ss:

William A. Prendergast, being duly sworn, deposes and says:

That he is and since 25 April, 1921, has been a member and the Chairman of the Public Service Commission, State of New York, upon which said date all members of the said Commission duly qualified and entered upon the discharge of their duties.

161 That pursuant to law the present Public Service Commission succeeded to the powers and duties of the former Public Service Commission for the Second District, including its jurisdiction over telephone corporations of the State of New York.

Upon taking office the Commission found pending 135 proceedings brought by municipalities in all parts of the State of New York against the rates charged and service rendered by the New York Telephone Company. The case of the City of Buffalo against New York Telephone Company, in which testimony had been taken by the former Commission for a period of over two years, was completed and decided by the present Commission. The case of the City of Syracuse against the New York Telephone Company, which had likewise occupied the attention of the former Commission for over two years, was completed and decided by the present Commission. The case of the application of the New York Telephone Company for an increase of rates in the City of New York, in which the former Commission had already heard over 2,600 pages of testimony, representing the Company's case only, was continued and is still pending. Since March, 1922, the City of New York has been developing its side of the case.

Experience indicated that it would apparently take several years before the other 132 cases would be disposed of and the telephone situation in this State properly settled. These cases were closely connected with one another, representing adjacent territory and overlapping facilities. It, therefore, seemed best to the Commission by its order of 10 November, 1921, to condense the whole situation in New York State into one State-wide case (Case No. 377). A copy of said order and the memorandum which accompanied it when made is hereunto annexed marked Exhibit "A."

162 The complaints of telephone subscribers as to service as well as rates were constantly increasing. In New York City this was largely due to the failure of the Telephone Company to furnish service to applicants therefor. The New York Office of the Commission in March, 1921, had received and closed 123 written complaints. In March, 1922, the same office reported 188 such complaints.

There was an urgent necessity for constructive effort on the part of the Commission to go hand in hand with its critical investigation and formal proceedings. The Commission, therefore, has built up an elaborate organization for the purpose of making a comprehensive investigation into every phase of the telephone situation in the State of New York, in accordance with the provisions of the memorandum accompanying its order of 10 November, 1921 ("Exhibit A"), and for the further purpose of

(a) Investigating service throughout the State (320 exchanges), the investigators working from bases at New York City, Albany, Buffalo, and through the central division of the State—as to local conditions, industrial, social, residential; as to administration, operators' schools, and the general community attitude.

(*b*) Investigating the situation as to business and residential coin box service in Chicago, Boston and Philadelphia, with a view to determining the application of this type of service to New York City and other cities of the State.

(*c*) Investigating the matter of call registering devices at subscribers' stations as used in other large cities.

(*d*) As to a physical investigation and check of the in-
163 ventories of the property of the company used in the telephone business in the State of New York.

In order to carry out this extensive but nevertheless necessary program the Commission has gone to large expense and has completed much of the work. In the State-wide proceeding the Commission has had 12 extended hearings, received in evidence 198 exhibits, and heard 2,180 pages of testimony. As a result of this inquiry the Commission has deemed it proper, in accordance with the power duly given it by the legislature of the State of New York, to fix a temporary rate pending further hearings in this proceeding and its final determination of the case. A copy of the Commission's said order fixing a temporary rate and its reasons in support thereof are annexed and marked "Exhibit B."

(Sgd.) WM. A. PRENDERGAST.

Sworn to before me this 7th day of April, 1922.

(Sgd.) MAURICE A. ROTHSTEIN,
Notary Public, Bronx County.

Bronx County Clerk's No. 163.
New York County Clerk's No. 977.

Your attention is called to the date and place for hearing named in the order. You are invited to be present or represented at this hearing.

—— ——,
Secretary.

164 SCHEDULE "A."

State of New York,

Public Service Commission.

At a Session of the Public Service Commission held in the City of New York on the 10th Day of November, 1921.

Present:

William A. Prendergast,
Chairman;
William R. Pooley,
Charles Van Voorhis,
Oliver C. Semple,
Charles G. Blakeslee,
Commissioners.

In the Matter of the Hearing on Motion of the Commission as to Rates, Charges, and Rentals, and the Regulations and Practices Affecting Rates, Charges, and Rentals of the NEW YORK TELEPHONE COMPANY [Case No. 377].

On the motion of the Commission,
It is Ordered:

(1) That a hearing be had as to the rates, charges, tolls and rentals, demanded, exacted, charged or collected by the New York Telephone Company, within the State of New York, for the transmission of messages or communications by telephone, and for the rental or use of any telephone line, receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance or device or any extension or extension system; and as to the rules, regula-
165 tions and practices of said New York Telephone Company affecting such rates, charges, rentals or service; to the end that if the same or any part thereof be unjust, unreasonable, unjustly discriminatory or unduly preferential, or anywise in violation of law, or if the maximum rates, charges or rentals chargeable by said New York Telephone Company are insufficient to yield reasonable compensation for the service rendered, the Commission may determine the just and reasonable rates, charges and rentals to be thereafter observed and in force as the maximum to be charged, demanded, exacted or collected for the performance or rendering of the service specified and fix the same by order;

(2) That such hearing be held at the office of the Commission, No. 91 State Street, Albany, New York, on the 29th day of November, 1921, at 10 A. M.

(3) That notice of the time and place of such hearing be given, by the secretary of this Commission, to said New York Telephone Company, and to the complainants in proceedings as to any rates,

charges or rentals of said New York Telephone Company, now pending before this Commission undetermined, and others.

By the Commission.

FRANCIS E. ROBERTS,
Secretary.

166 State of New York,

Public Service Commission.

In the Matter of the Hearing on Motion of the Commission as to Rates, Charges, and Rentals and the Regulations and Practices Affecting Rates, Charges, and Rentals of the NEW YORK TELEPHONE COMPANY [Case No. 377].

Memorandum.

November 10, 1921.

BLAKESLEE, *Commissioner:*

There are pending before this Commission some 135 cases, representing complaints made to the former Public Service Commission, Second District, by various municipalities within the State of New York, against the New York Telephone Company.

The former Commission held hearings in three of these cases. The Syracuse and Buffalo cases were finished, in so far as the submission of evidence was concerned, but the briefs were submitted to, and final argument of counsel had, before this Commission. The Company has presented its side of the matter, in the New York City case, but the City is not yet prepared to proceed with its proof.

This Commission has decided the Buffalo and Syracuse cases, which occupied over 2 years in their presentation and have undoubtedly cost the municipalities, the Telephone Company and the State of New York large sums of money. The facts found and results attained after all this expenditure of time and money are of comparatively little value in so far as they affect the disposition of the 135 pending cases.

167 It is apparent, therefore, if these cases are heard separately, it will be several years before they are finally disposed of. This will not answer; relief—so long delayed—is not only unsatisfactory and unjust, but is contrary to the spirit of the law under which this Commission was established.

In order to determine these pending cases and to provide against the recurrence of such an impossible condition of affairs, a comprehensive plan for the equitable and prompt disposition of these cases and a final decision of the disputed facts which underlie all of them, must be had.

In connection therewith certain facts should be understood and considered, namely:

The New York Telephone Company, either directly or through subsidiary companies, owns and operates 95 per cent of the telephones in New York State. The New York Telephone Company is by stock ownership, or otherwise, controlled by the American Tele-

phone and Telegraph Company, to the extent that its revenues and expenses are, and have been, increased or diminished, by moneys received from, or moneys paid to the said American Telephone and Telegraph Company, under contracts and agreements not clearly explained or understood, and because of which telephone rates may be affected. There are also certain relationships existing between the New York Telephone Company and a corporation manufacturing and supplying telephone equipment, known as the Western Electric Company.

The New York Telephone Company operates under a State-wide franchise and renders service of one character throughout the State. It operates both toll and local exchange service, and in so doing furnishes a public service to its subscribers, whether in the
168 same community or in separate and distant localities. Its toll and exchange service are carried on through the medium of the same property and appliances, to a large extent, and these two services can not be separated without a diminution in the value and convenience of each. The Company's local exchange boundaries are not co-terminous with the boundaries of the municipality in which they are located, but are created by the Telephone Company for the purpose of convenience in equalizing the charges for "short haul" service, that is, for service within certain distances from the local exchanges.

The Company's capital investments and its various reserve funds are not made up or divided with regard to the local exchange areas or municipal limits, but are maintained as single funds. The books and the records of expenses, etc., are not duplicated by localities, but are kept for the single service of the Company.

The law, in the matter of fixing telephone rates, directs that the

"Commission shall, with due regard among other things, to a reasonable average return upon the value of the property actually used in the public service * * * determine the just and reasonable rates, charges and rentals * * * as the maximum to be charged * * * for the performance or rendering of the service."

and that such rates must not be unduly preferential or discriminatory.

In the Buffalo and Syracuse cases, the proof was submitted, under a ruling of the former Commission, based on the "local area" or "segregated district" theory. This "local area" theory requires that telephone rates in any particular municipality shall be based on the Company's investments in wires, apparatus, etc., utilized within the boundaries of that municipality.

169 Another method, known as the "Company-wide" theory, requires the fixing of rates based on a valuation of the Company's entire property; the determination of proper and necessary expenses and the amount of revenues requisite to meet these expenses. Under this method, the payment of this revenue is distributed over all the Company's various exchanges, in just proportions, according to the class of service desired, the number of subscribers, and the physical, industrial, commercial, social, business and residential needs and conditions.

The former Commission, as shown by the record, had an equal division of opinion over these two methods of procedure, but finally adopted the "local area" theory. That body, as well as the representatives of the municipalities concerned, evidently believed that the facts found in the Syracuse and Buffalo cases, would be determinative in the various other telephone rate cases.

Unfortunately this has not proven to be a fact, for the reason that the "local area" theory depends upon the establishment and consideration of the value of the Company's investment in each locality. This value is necessarily different and a matter of dispute in every locality. A further acceptance and application of this method to the pending cases requires the establishment of 135 separate valuations based on municipal boundaries or local exchange areas, and for all practical purposes involves the examination of the Company's property and its operations in almost every portion of the State of New York, and in this connection it should not be overlooked that although the first complaint of the number referred to was filed April 30, 1918, only two cases have so far been decided, and evidence partly taken in one other.

170 To continue this method of procedure means also the attempted allocation and segregation of the proper proportion of the reserves and other funds of the Company, its revenues and expenses to each local area under investigation, as well as the division and segregation of the physical property into toll and exchange property and toll and exchange use. The expense thereof, borne by the municipality concerned, is very large. In the case of the smaller communities this expense is greater than any result attained would justify. Such a burden of expense ought not to be placed upon the telephone subscribers and the community, if it can be avoided.

The Syracuse and Buffalo cases were decided solely on the "local aea" proof submitted. No evidence in support of, or bearing upon the Company or State-wide investigation was considered. In the Syracuse case all reasonable contentions of the City were accepted—even then the Company's return for the period covered was not shown to be excessive.

Any observations made in regard to State or Company-wide rates or valuations, methods or classes of service, in that case, were not made for the reason that the injustice and futility of the "local area" scheme of handling telephone rates was so pointedly evident in the Syracuse case.

In the Syracuse and Buffalo cases these matters have been so forcibly brought to our attention that it is felt that the "local area" theory fails to get at the real facts, is unduly expensive, obviously productive of protracted litigation, impractical and inadequate.

Among many illustrations the following are referred to:

In the Buffalo case it was necessary to appraise an office building in New York City—over 400 miles from the Buffalo local
171 area—because executive, supervising and accounting work is carried on there for the entire Company, and so is of benefit

to the Buffalo local area. The percentage finally arrived at—of these various services—2.3 per cent—was then applied to the valuation of the building and charged to Buffalo. A garage and shop, the Seneca Office Building (used for Offices of the Western District of the Company), and the cost of all the general telephone equipment in the western district, had to be so apportioned. Carrying these computations to the extent of their separation into exchange and toll property, and into exchange and toll use, gives an idea of the expense involved in only one phase of the inquiry following the theory used. The financial benefit to the experts and attorneys engaged may be considerable, but the ultimate cost to the telephone subscriber and the tax-payer is an unnecessary burden.

The contracts between the New York Telephone Company and the American Telephone and Telegraph Company, in regard to rentals paid, patents used, joint use of pole lines, division of toll charges and rentals, coupled with the fact of control of the one Company by the other, have so apparently entangled their relationship, that a single community finds it practically impossible to adequately inquire into any of these matters.

The Company's representatives also attempt to secure a separate allowance for "going value" in every case as a part of the value of its property in each locality for which a rate is to be determined.

Experts employed by the various municipalities, as well as those of the Company itself, get the figures from the Company's books, for all expense items, revenues and the various reserves and
172 other funds of the entire Company, and then try to arbitrarily allocate and segregate the portions which they believe should be assigned to the area under consideration. This results in endless inaccuracies, disputes and directly conflicting evidence and opinion.

The overhead expenses of management, executive direction, supervision and auditing, are carried on the Company-wide basis. Extravagances and needless expenditure of money by the Company, for excessive salaries and other things, multiplicity of detail and waste in the supervision of lines and in management, can be determined when the operations of the Company are considered as a whole.

Following the "local area" a separation of toll and exchange property and service becomes necessary. It must be evident that no one wishes a separate toll system, with consequent duplication of expense, and lack of convenience.

If return be based solely on local investment, no Company can develop unprofitable territory or extend telephone service to smaller communities. The measure of value of telephone service to a subscriber is based upon the most complete extension of telephone service.

Under the "Company-wide" theory, however, it would seem that nearly all of these difficulties are obviated. Every fact relative to the conduct of the Company's entire business is investigated including the determination, once and for all, of the value of the Company's entire property, as well as expenses required for the operation and maintenance of proper service.

The amount of revenue necessary can then be obtained by rates which are uniform, under like circumstances and conditions, instead of through hundreds of separate rates and classifica-
173 tions for the same character of service, with the consequent discrimination and undue preference. Both toll and exchange rates can be so fixed and toll service costs and returns determined on a proper and sound basis.

The burden of such investigation is assumed by the Commission under this method, and instead of duplicating the expense many times, through the trial of hundreds of detailed and long drawn out rate cases—with years of delay and litigation—the one investigation and determination is conclusive.

The facts found and valuations so made should furnish a sound and settled basis for the use of a community, or the Commission, in any future investigations. Any community, feeling itself aggrieved, may then, with comparatively little cost, present its evidence to the Commission as to unreasonable or discriminatory rates, having practically all the essential facts ready for its use and established of record. The unreasonableness or discriminatory character of rates can be shown by rates in other communities similarly situated, and the adequacy of service easily determined.

This is no novel or untried idea. It has been successfully adopted and followed by New Jersey, Pennsylvania, Maryland, Georgia, Wisconsin, Colorado and other States.

After careful study and consideration of the entire matter, it seems necessary that some form of the "Company-wide" or "State-wide" investigation and determination of telephone rate cases should be adopted.

It therefore follows that a hearing should be entered upon, on the motion of this Commission, and an investigation had of the rates, charges and rentals of the New York Telephone Company within the State of New York, and of the rules, regulations and
174 pratices of said Company, and of its inter-corporate relationship to other companies—and that the representatives of all municipalities, or other complainants having matters pending before this Commission, against the New York Telephone Company, be requested to appear and be heard—to the end that the said complainants, this Commission, and the general public may be informed as to:

(1) The value of the New York Telephone Company's physical property, its investment costs, its book value, its structural value, together with the payments for interest and taxes during construction.

(2) The cost of the establishment of the business as shown by actual experience and the payments therefor.

(3) The securities issued by the Company, the amounts realized from the sale thereof, the interest and dividends paid thereon, and the charges for amortization of discounts.

(4) The operating and other revenues and expenses of the Company within the State of New York.

(5) The exact relationship heretofore and now existing between the New York Telephone Company and the American Telephone and Telegraph Company, the contracts, rates, benefits and obligations upon either side, and the services received by either from the other, with the amounts paid therefor.

(6) A list and description of all the patents owned and controlled by the American Telephone and Telegraph Company, and their value as to utility, benefit and the use of the same by the New York Telephone Company now and heretofore.

175 (7) The toll contracts with the American Telephone and Telegraph Company, together with the system of toll rates charged now and heretofore in the State of New York; the revenues and expenses thereof and the division of the same.

(8) The investment cost, the structural value and the service value of all of the properties of the American Telephone and Telegraph Company in the State of New York.

(9) The working capital of the New York Telephone Company; its financial requirements, with a detailed statement of its outside investments, or its investments in subsidiary companies, together with all earnings of such companies and the returns received by the New York Telephone Company.

(10) The year by year requirements for depreciation of the New York Telephone Company, including expenditures for replacements and reserve for retirements, the present reserve, and the amount of depreciation accrued each year for the entire Company, and for the property in the State of New York.

(11) New York State's proportion of the reserve for depreciation, the districts of the State in which such reserve was built up, and the debits and credits to such reserve in each district.

(12) The reserves of the Company, their use for depreciation, and the purpose, amount and source of the same.

(13) The rewards to promoters, the amount and character of the service given, and the benefits accruing therefrom to the Company.

176 (14) The exact relationship heretofore and now existing between the Western Electric Company and the New York Telephone Company, either directly or through the American Telephone and Telegraph Company, or any other subsidiary companies of either of such companies, the contracts, rights, benefits and obligations accruing to or against the New York Telephone Company in the course of such relationship, and the moneys paid, received or disposed of by the New York Telephone Company because of, or growing out of such relationship.

(15) The New York Telephone Company's plan for employees' pensions, disability benefits and death benefits, now or heretofore established and in practice, the basis of contributions and the distribution thereof.

(16) The practice of charging for service connections in the State of New York, the original basis of such charge, the development of the same and the causes thereof.

(17) The practice of charging for trunk lines, and additional trunk lines, the origin of such charges, the development of the same, and the causes thereof.

(18) The expenses of all publicity campaigns, by the New York Telephone Company, and the reasons for same, or of any of its subsidiary companies, together with the method of conducting same since January 1, 1914.

(19) The investment cost, the structural value, and the condition of all transmitters, receivers, induction coils or other devices or appliances, property of the American Telephone and Telegraph Company, in use by the New York Telephone Company, in the State of New York.

177 (20) The practice of the Company as to the publication of telephone directories, the contracts therefor and the cost thereof.

(21) The wage scale of the New York Telephone Company now and heretofore in force, the basis thereof and the adjustments or modifications necessary or amounts expended by the Company for adaptations of same to present and future conditions.

(22) The rates and charges and the results in revenues and expenses in the State of New York, and in the various localities thereof for (*a*) Measured Service, (*b*) Automatic Switching Equipment.

(23) The adjustment and apportionment plan for fixing of rates for service and rental for property in the various localities and communities of the State, according to population and demand by industrial, commercial, physical, business, social and residential conditions which shall result in uniform rates and rentals under like circumstances and conditions, without undue preference or unjust discrimination.

And further that all such hearings be continued uninterruptedly until the matters above stated are fully and completely investigated.

All concur.

[Attest.]

FRANCIS E. ROBERTS,
Secretary.

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EXHIBIT B.

State of New York,

Public Service Commission.

At a Session of the Public Service Commission Held in the City of Albany on the 3rd Day of March, 1922.

Present:

William A. Prendergast,
Chairman;
William R. Pooley,
Charles Van Voorhis,
Oliver C. Semple,
Charles G. Blakeslee,
Commissioners.

In the Matter of the Hearings on Motion of the Commission, as to Rates, Charges, and Rentals and the Regulations and Practices Affecting the Rates, Charges, and Rentals of THE NEW YORK TELEPHONE COMPANY [Case No. 377].

The Public Service Commission having entered upon hearings as to rates, charges and rentals, and the regulations and practices affecting the rates, charges and rentals of the New York Telephone Company within the State of New York;

And it appearing to the satisfaction of the Commission that public interest requires a change in the rates, charges and rentals for telephone service charged by the New York Telephone Company within the State of New York, temporarily and pending a final determination of the rates, charges and rentals to be thereafter demanded, exacted or collected by said New York Telephone Company;

Now, therefore, under the provisions of the Public Service Commission Law, it is

Ordered: (1) That all of the towns, cities and villages hereinafter named in which the said New York Telephone Company operates exchanges, and all of the telephone exchanges therein, are hereby for the purpose of this Order, and for the purposes of the temporary rates established by this Order, classified and divided into
179 groups as in this Order, hereinafter stated, and that the rates, charges and rentals to be hereinafter demanded, exacted or collected by the said New York Telephone Company shall be as in this Order stated, all said rates, charges and rentals to take effect and be in force on and after April 1, 1922, and to remain in force and effect pending a final determination of the rates, charges and rentals to be thereafter demanded, exacted or collected by such New York Telephone Company, or until the further Order of this Commission. All rates, charges and rentals applying to any and all

other service furnished by said New York Telephone Company to be and remain as stated in the Company's schedules of rates, charges and rentals for service.

The grouping and classification of said towns, cities and villages, and the exchanges operated therein, and the temporary rates, charges or rentals to be demanded, exacted or collected therein, shall be as follows, and payable monthly in advance:

Group I.

Arkport.	Fabius.	Porters Corners.
Barker.	Greenwood Lake.	Selden.
Bliss.	Hermitage.	Sharon Springs.
Campbell.	Kendall.	Shokan.
Carmel.	Kent Cliff.	South Onondaga.
Cayuga.	Newfield.	South Salem.
Center Brunswick.	North Clove.	Stanfordville.
Cicero.	Osceola.	Varysburg.
Commack.	Owasco.	Waterport.
Elba.	Parish.	Woodstock.
Enfield Center.	Phoenicia.	Yorktown Heights.
Esopus.	Pleasant Valley.	

Basic Area Rates.

Business telephone, 1 party, unlimited service	$3.00
Residence telephone, 1 party, unlimited service	2.25
Business telephone, 4 party, unlimited service	2.25
Residence telephone, 4 party, unlimited service	2.00

Rural Service:

Business telephone	2.25
Residence telephone	2.00

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Group II.

Alden.
Altamont.
Amagansett.
Amenia.
Angola.
Averill Park.
Avoca.
Bayport.
Bolton.
Brentwood.
Bridgehampton.
Camden.
Canaseraga.
Canisteo.
Castleton.
Central Islip.
Chatham.
Cleveland.
Clinton Corners.
Constantia.
Croton Falls.
Deposit.
Dover Plains.
East Quogue.
East Syracuse.
Fayetteville.
Floral Park.
Forestville.
Garden.
Garrison.
Groton.
Highland Falls.
High Falls.
Holland.
Horseheads.
Hyde Park.
Interlaken.
Jonesville.
Lake George.
Lewiston.
Liverpool.
Mahopac.
Moravia.
Orchard Park.
Patterson.
Philmont.
Pine Hill.
Portville.
Ransomville.
Ronkonkoma.
Rosendale.
Sacket Harbor.
Sag Harbor.
Sempronius.
Shoreham.
Silver Creek.
Smithtown.
South Dayton.
Springville.
Trumansburg.
Tully.
Union Springs.
Valley Falls.
Voorheesville.
Warrensburg.
Water Mill.
Weedsport.
Wingdale.
Youngstown.

Basic Area Rates.

Business telephone, 1 party, unlimited service	$3.50
Residence telephone, 1 party, unlimited service	2.50
Business telephone, 4 party, unlimited service	2.75
Residence telephone, 4 party, unlimited service	2.00

Rural Service:

Business telephone	2.50
Residence telephone	2.00

NOTE.—In all Exchanges having more than one rate zone, the same rate differences now existing between zones shall apply.

181 *Group III.*

Akron.
Amityville.
Arcade.
Attica.
Baldwinsville.
Bath.
Barneveld.
Bedford Village.
Bellport.
Brewster.
Burnt Hills.
Canastota.
Center Moriches.
Chappaqua.
Cherry Creek.
Clarksville.
Clintondale.
Clinton.
Cobleskill.
Cold Spring.
Dolgeville.
Easthampton.
Eastport.
Eden.
Ellenville.
Farmingdale.
Fleischmanns.
Gasport.
Good Ground.
Goshen.
Gowanda.
Greenport.
Hamburg.
Hamilton.
Hicksville.
Highland.
Holley.
Hoosick Falls.
Islip.
Jamesport.
Jordon.
Katonah.
Kings Park.
Liberty.
Long Beach.
Lyndonville.
Marlboro.
Massapequa.
Mattituck.
Mexico.
Middleport.
Millbrook.
Milton.
Montour Falls.
Oakfield.
Newfane.
New Paltz.
North Collins.
Northport.
North Salem.
Orient.
Pawling.
Pearl River.
Peconic.
Port Jefferson.
Quogue.
Riverhead.
Sayville.
Setauket.
Shelter Island.
Skaneateles.
Southold.
St. James.
Stony Brook.
Wappingers Falls.
Watkins.
Westbury.
West Hampton.
Williamsville.
Wilson.
Woodmere.
Yaphank.

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$3.75
Residence telephone, 1 party, unlimited service	2.75
Business telephone, 2 party, unlimited service	3.35
Residence telephone, 2 party, unlimited service	2.50
Business telephone, 4 party, unlimited service	3.00
Residence telephone, 4 party, unlimited service	2.10
Rural Service:	
Business telephone	2 75
Residence telephone	2.10

NOTE.—Two party line service may be furnished subscribers in the exchanges in this group at the option of the company at a rate of not in excess of the one set forth.

NOTE.—In all Exchanges having more than one rate zone, the same rate differences now existing between zones shall apply.

182 *Group IV.*

Albion.
Babylon.
Ballston.
Barre Center.
Bay Shore.
Beacon.
Blue Point.
Catskill.
Cold Spring Harbor.
Congers.
Derby.
East Aurora.
Endicott.
Great Neck.
Greenwich.
Hastings.
Haverstraw.
Huntington.
Lindenhurst.
Manhasset.
Medina.
Mt. Kisco.
Nanuet.
New City.
New Hartford.
Nyack.
Owego.
Oyster Bay.
Patchogue.
Penn Yan.
Piermont.
Pleasant Valley.
Pt. Washington.
Roslyn.
Saugerties.
Schuylerville.
Southampton.
Spring Valley.
Suffern.
Valley Stream.
Whitesboro.
Ulster Park.

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$4.25
Residence telephone, 1 party, unlimited service	3.00
Business telephone, 2 party, unlimited service	3.65
Residence telephone, 2 party, unlimited service	2.75
Business telephone, 4 party, unlimited service	3.25
Residence telephone, 4 party, unlimited service	2.25

Rural Service:

Business telephone	3.00
Residence telephone	2.25

NOTE.—In all Exchanges having more than one rate zone, the same rate differences now existing between zones shall apply.

183 *Group V.*

Allegany.
Batavia.
Briarcliff.
Claverack.
Corning.
Cortland.
Dobbs Ferry.
Dunkirk.
Fayette.
Frankfort.
Freeport.
Garden City.
Geneva.
Glen Cove.
Hempstead.
Herkimer.
Homer.
Hornell.
Hudson.
Ilion.
Irvington.
Lancaster.
Little Falls.
Lockport.
Lynbrook.
Mamaroneck.
McGraw.
Mechanicville.
Olean.
Oneida.
Park (New Rochelle)
Ossining.
Oswego.
Peekskill.
Port Chester.
Rockville Center.
Rome.
Rye.
Salamanca.
Saratoga Springs.
Seneca Falls.
Sloatsburg.
Tarrytown.
Tonawanda.
Waterloo.
Wanakah.
Waverly.
Wantagh.

Basic Area Rates.

	Per month.
Business telephone 1 party, unlimited service	$5.25
Residence telephone, 1 party, unlimited service	3.25
Business telephone, 2 party, unlimited service	4.25
Residence telephone, 2 party, unlimited service	2.85
Business telephone, 4 party, unlimited service	3.75
Residence telephone, 4 party, unlimited service	2.35

Rural Service:

Business telephone	3.10
Residence telephone	2.35

NOTE.—Business 4 party line service may be furnished subscribers in the exchanges in this group at the option of the Company at a rate not in excess of the one set forth.

NOTE.—In all Exchanges having more than one rate zone, the same rate differences now existing between zones shall apply.

184 *Group VI.*

Amsterdam.
Argyle.
Auburn.
Brookville.
Elmira.
Elmsford.
Fort Edward.
Glens Falls.
Hudson Falls.
Kattskill Bay.
Kingston.
La Salle.
Newburgh.
Niagara Falls.
Poughkeepsie.
Ramapo Hills.
Scarsdale.
Watertown.
White Plains.

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$6.25
Residence telephone, 1 party, unlimited service	3.50
Business telephone, 2 party, unlimited service	5.25
Residence telephone, 2 party, unlimited service	3.00
Residence telephone, 4 party, unlimited service	2.50

Rural Service:

Business telephone	3.25
Residence telephone	2.50

NOTE.—In all Exchanges having more than one rate zone, the same rate differences now existing between zones shall apply.

Group VII.

Binghamton.
Bronxsville.
Hillcrest.
Johnson City.
Mt. Vernon.
Larchmont.
New Rochelle.
Oakwood.
Pelham.
Tuckahoe.
Yonkers.

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$7.00
Residence telephone, 1 party, unlimited service	3.75
Business telephone, 2 party, unlimited service	6.00
Residence telephone, 2 party, unlimited service	3.25
Residence telephone, 4 party, unlimited service	2.65
Rural Service:	
Business telephone	3.40
Residence telephone	2.65

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Group VIII.

Cohoes.
North Troy.
Schenectady.
Troy.
Utica.
Waterford.
Watervliet.

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$8.00
Residence telephone, 1 party, unlimited service	4.00
Business telephone, 2 party, unlimited service	6.25
Residence telephone, 2 party, unlimited service	3.40
Residence telephone, 4 party, unlimited service	2.75
Rural Service:	
Business telephone	3.60
Residence telephone	2.75

Group IX.

Albany. { Main. East. West. } Delmar. Syracuse. { James. Warren. Montgomery. }

Basic Area Rates.

	Per month.
Business telephone, 1 party, unlimited service	$8.50
Residence telephone, 1 party, unlimited service	4.25
Business telephone, 2 party, unlimited service	6.50
Residence telephone, 2 party, unlimited service	3.50
Residence telephone, 4 party, unlimited service	2.85
Rural Service:	
Business telephone	3.75
Residence telephone	2.85

186 *Group X.*

Buffalo.

Basic Area Rates.

	Per month.
Individual Line, Business and Residence, Message:	
80 or less	$4.00
Next 120—each	.05
Next 50—each	.04
All over 250—each	.03
Residence telephone, 1 party, individual line, unlimited	4.75
Residence telephone, 2 party, individual line, unlimited	3.75
4 Party, Residence only, Message:	
60 or less	2.75
Next 40—each	.04
All over 100—each	.03
Outside Area:	
4 Party line, Business and Residence, Message:	
70 or less	3.25
Next 30—each	.04
All over 100—each	.03

Group XI.

New York City.

(Comprising the Boroughs of Manhattan, the Bronx, Brooklyn, Queens and Richmond.)

The rates for this group shall be as prescribed in the Order of March 3, 1922, in Case No. 7720, upon terms and conditions as therein set forth.

Special Group A.

Company's present rates for these exchanges will apply.

Bayside.	Solvay.
Blue Stores.	Syosset.
Ithaca.	Tuxedo.
Lycoming.	Wheatley Hills.
Prospect.	

187 Ordered: (2) This Order is made without prejudice to the conditions and requirements of any and all bonds heretofore given by the said New York Telephone Company in any and all proceedings involving rates, charges and rentals, applicable to any or all of the various exchanges listed herein, and without prejudice to any obligations of the New York Telephone Company, or its sureties, on any bonds heretofore given in any proceeding and now in force, to secure repayments to subscribers of sums paid for service under order therein of the former Public Service Commission, Second District, State of New York, or of this Commission, in excess of the rates, charges or rentals which may be fixed therein by final determination of the Commission as the rates, charges or rentals to be demanded, exacted or collected for service to any such subscribers.

Ordered: (3) It is further Ordered that the New York Telephone Company, and any and all municipalities affected by this Order, may apply to the Commission for a modification of the classifications heretofore made, by filing application, in writing, stating the reasons therefor, at the Office of the Commission at Albany, New York, on or before April 15, 1922.

By the Commission,

[SEAL.]

FRANCIS E. ROBERTS,
Secretary.

Take notice of an order of which I certify the foregoing is a true copy.

——— ———,
Secretary.

188 State of New York,

Public Service Commission.

In the Matter of the Hearing, on Motion of the Commission, as to Rates, Charges, and Rentals and the Regulations and Practices Affecting the Rates, Charges, and Rentals of THE NEW YORK TELEPHONE COMPANY [Case No. 377].

Albany, March 3, 1922.

Memorandum of the Commission.

The evidence already submitted in this case has been carefully considered, and it appears to the satisfaction of the Commission that public interest requires certain reductions and readjustments in the rate schedules of the New York Telephone Company, and that these reductions are reasonable as immediate temporary decreases pending the final determination of this proceeding.

The Commission is of the opinion that the rates now put in effect are necessary at this time, not only on account of the downward price trend of all materials, the decreasing cost of money, the daily readjustments in the labor market, the effort toward economy manifested by all private business enterprises, but also because the Commission is convinced that the sums set aside for annual expenses of depreciation are largely in excess of what is necessary, and in consequence the accumulated depreciation reserve is increasing more rapidly than conditions warrant.

The Commission believes that the Company's estimates of the rates of depreciation are too high and are not substantiated by the evidence. The testimony indicates that in a telephone property with a rate of growth similar to that of the New York Telephone Company, the depreciation reserve tends to become stabilized at approximately 30 per cent of the cost of the depreciable property. The Company's depreciation reserve apportioned to New York State now stands at $69,596,739, whereas its total fixed capital in New York State, including land and intangible items, is $229,427,813, producing a ratio of more than 30 per cent. But when this Company was brought under the supervision of the Public Service Com-
189 mission twelve years ago, the ratio of its depreciation reserve to fixed capital was only 10.7 per cent. In other words, there has been accumulated through charges to revenue since 1910 more than $15,000,000 of depreciation moneys that should have been set aside out of revenue prior to 1910, and is now presumably included in the Company's surplus. It must be clear that depreciation rates which have enabled the Company in twelve years to make up a depreciation deficiency of $15,000,000 have been too high and should now be reduced.

The Company estimates the necessary expense of depreciation for 1922 to be $12.800,000. On the facts presented, we believe $10,000,000 is sufficient.

The Company also estimates that its publicity and advertising expenses for 1922 should be $300,000. Reasonable public announcements of changes in telephone equipment or in character of service, issuance of directories, and necessary instruction in the use of telephone mechanism should be given to the public. But advertising, in order to justify rate increases, either contemplated or in effect, to set forth attractiveness of employment in the Company's service, or to market the Company's securities, should not be charged to subscribers. If expenses of the latter class mentioned were paid from the Company's surplus, no criticism could be made. We believe that this expense should be materially reduced.

The dividend history of this Company, an average annual return of 8.17 per cent, during the past twenty-five years, and the accumulation of surplus (undivided profits) of $36,579,446, during the same period, make it apparent that the Company has been generously treated in the matter of rates.

We believe that the entire schedule of expenses of the New York Telephone Company can undergo reasonable revision, with a view to reaching a basis of expenditure fair to the public. The Telephone Company should make this revision. If this is done it will not interfere with the Company's securing a reasonable return upon its investment. The Company has shown an unwillingness to abandon any of its costly methods of doing business, no matter how burdensome to subscribers who furnish the revenue necessary to cover all expenditures. The situation which this and every other public utility must face is that in a period of increased costs it is its duty to adjust expenditures to meet these costs rather than to expect to exact from the public the full measure of such costs by means of increased
190 rates. In order to meet the economic conditions which were the outgrowth of the war, the Company was permitted to increase its rates everywhere throughout the State. With the exception of the reductions made by this Commission in the rates in New York City and in Buffalo, there has been no change from the rates set up in accordance with these advances. We are now in a period of economic readjustment, which is entailing hardships upon the public as a whole. It is not reasonable that a public utility such as the New York Telephone Company should, during this period of readjustment, continue to enjoy practically the full measure of the advances that were allowed to it as a result of war conditions. The reductions ordered are, in the judgment of this Commission, demanded in the public interest.

The Commission has endeavored in the accompanying orders to establish rates which shall be uniform in all exchange areas of the same approximate telephonic development, demand and plant requirements, taking into consideration the character and value of the service demanded by subscribers and furnished by the Company; and has classified the different municipalities and exchanges in accordance with such requirements. The Company, or any munici-

pality, may apply for a modification of these classifications on or before April 15, 1922.

It follows that the accompanying orders should be entered, to be effective April 1, 1922, and thereafter until the final determination of this proceeding, or until the further order of the Commission.

All concur.

Attest:

FRANCIS E. ROBERTS,
Secretary.

191 *Affidavit of Edward B. Rogers.*

United States District Court, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST and Others, Constituting the Public Service Commission of the State of New York, et al., Defendants.

ALBANY COUNTY, *ss:*

Edward B. Rogers, being duly sworn, says:

I am assistant engineer in the office of the Public Service Commission of the State of New York in charge of the telephone and telegraph division. I graduated a bachelor of arts at Amherst College in the year 1887 and engaged in the telephone business in the fall of that year. From September 1, 1887, to September 1, 1910, I was employed in various capacities from clerk to general manager with an associate company of the Bell system and with the plaintiff herein. On September 1, 1910, I was appointed chief of the division of telephones and telegraphs of the Public Service Commission, Second District, and continued in that position until the creation of the present Public Service Commission of the State of New York,
192 which assumed office in the month of April, 1921; and I have been continued in the same work to the present time. I have been throughout my service with the Public Service Commission, Second District, and with the Public Service Commission of the State of New York, its successor, familiar with the tariffs of rates in effect by the New York Telephone Company. During the period of Government Control of all telephone lines from August 1, 1918, to July 31, 1919, the Postmaster General of the United States issued orders advancing certain telephone rates for both local and toll service rendered by the lines of the New York Telephone Company in the State of New York. The increases made by the Postmaster General during this period for local telephone service were for specific points rather than in the nature of a general increase in the level of all rates.

The increase in toll rates made by the Postmaster General, however, during said period effected an increase in the general level of all telephone toll rates throughout the state. The Postmaster General also introduced an additional charge, namely, that which is called the "service connection charge," which was an entirely new feature and which at the present time produces for the New York Telephone Company an additional revenue in excess of one million dollars ($1,000,000) a year. This charge was for a service not theretofore made the subject of a specific rate.

After a critical examination and review of the rates specified in the orders of the Public Service Commission dated March 3, 1922, I find that such rates are in each and every instance not less than, and in general are in excess of, the corresponding rates for the several cities and villages specified, established by the Postmaster General and collected during his administration.

193 Certain toll rates established by the Postmaster General have been increased by the New York Telephone Company since Government Control was relinquished and are not affected by the Commission's orders of March 3, 1922.

EDWARD B. ROGERS.

Sworn before me April 6, 1922.

CARL D. TAYLOR,
Notary Public.

194 *Affidavit of James G. Wray.*

United States District Court, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST and Others, Constituting the Public Service Commission of the State of New York, et al., Defendants.

STATE OF NEW YORK,
Albany County, ss:

James G. Wray, being duly sworn, says: That he resides at 618 Washington Avenue, Wilmette, Illinois; is a member of the firm of J. G. Wray and Company, First National Bank Building, Chicago, Illinois, Consulting Engineers, which firm engages in general and utility engineering, and is specially equipped for handling telephone problems.

That he is a graduate of the University of Wisconsin, in electrical engineering, with the class of 1893. From 1893 to 1916 he was employed by the Chicago Telephone Company, now the Illinois Bell Telephone Company, occupying various positions in the operating departments, in 1902 becoming Chief Engineer, which posi-

195 tion he held until he resigned to go into consulting practice in 1916. In 1911 he became also Chief Engineer of the Wisconsin Telephone Company, the Michigan State Telephone Company, the Central Union Telephone Company and the Cleveland Telephone Company; these companies, with the Chicago Telephone Company, being the Bell Telephone Companies that furnish service throughout practically all of the states of Michigan, Wisconsin, Illinois, Indiana and Ohio. Two or three years prior to his resignation as Chief Engineer of these Companies, he was, for a period of about one year, the Chief Engineer of the Receivers of the Central Union Telephone Company.

That as Consulting Engineers he and his firm have made many appraisals and investigations, for the United States government and for various state governments, foreign governments, cities, and both Bell and Independent Telephone Companies. For a period during the war he was Consulting Telephone Engineer for the Bureau of Standards of the Department of the Interior, Washington, D. C. He has been employed by the Government of the Province of Alberta, Canada, to make an extensive investigation of the government owned telephone system, including the valuation of the property and a recommendation as to rates. He has also been employed by the Government of the Province of Manitoba, Canada, to make an extensive investigation of the telephone service in Winnipeg, and of the difficulties which had been experienced with the automatic system. He was engaged by the Public Service Commission of Utah on a state-wide telephone investigation, which, through lack of funds, was never undertaken. He is now engaged by the Attorney General of the State of Mississippi in a state-wide investigation of telephone

196 rates. He has been engaged by the cities of Buffalo and Syracuse of this state in an investigation of telephone rates. He is now engaged in similar investigations for the cities of New York, Rochester and Jamestown. During the past three or four years he has been engaged as a Consulting Engineer to make valuations and investigations for the Northwestern Telephone Exchange Company, and the Tri State Telephone and Telegraph Company, which together furnish most of the telephone service in the state of Minnesota, the North Dakota Independent Telephone Company, operating throughout much of the state of North Dakota, the Western Electric Telephone System, covering about a third of the state of Iowa, the Indiana Bell Telephone Company, the Home Telephone and Telegraph Company of Fort Wayne, Indiana, the Illinois Bell Telephone Company, the Southwestern Bell Telephone Company, the Kinloch Telephone Company and others.

That he has been for the last year past and is now employed by the City of New York as telephone expert in connection with Case No. 7720, involving telephone rates in New York City.

That while employed by the City on this case he has made extensive investigations as to the value of the property of the New York Telephone Company in New York City, the revenues, the expenses, the charges for depreciation and other matters.

That he has examined the affidavit of Mr. George W. Whittemore

as to depreciation, verified March 29, 1922, and wishes to call attention to the following: That Mr. Whittemore sets forth certain depreciation rates for each of the several classes of depreciable property, put into effect by the Company August 1, 1919, and continued in effect up to this time.

197 That it should be noted that Mr. Whittemore sets forth the fact that during the period of government control, the depreciation rate fixed by the government was 5.72%, which rate was applied to all of the depreciable property except Right of Way Account, No. 202, which latter account carried separately a depreciation rate of 2.55%. The depreciation rate fixed by the government during the period of government control was the same for all Bell Telephone properties. It is a fact that the property of the New York Telephone Company has proportionately more of long lived plant such as underground cable and fireproof buildings than are to be found generally throughout the Bell Telephone system. In consequence, the New York Telephone Company should require a depreciation rate somewhat lower than the average for the entire Bell system. Notwithstanding this fact, the New York Telephone Company, at the close of the period of government control, increased the depreciation rate from 5.72% to 5.82% for the year 1920, and 5.81% for the year 1921.

That it should also be noted that since 1914 the unexpended balance in the depreciation reserve of the New York Telephone Company assigned to the State of New York has more than trebled, whereas the investment in property has increased only approximately 80%.

That the affiant is now engaged by the city of New York in extensive investigation of telephone rates in New York City, and that a study of depreciation recently made by him for New York City and testified to before the Public Service Commission shows that the depreciation rates now and heretofore in effect by the New York Telephone Company for the property in New York City have resulted in the accumulation of a depreciation reserve as of December 31,

198 1921, of $45,377,976 against the property in New York City; that this existing depreciation reserve is equal to 33.73% of the cost of the depreciable property in New York City as shown by the company's books; that the proper ratio of depreciation reserve to depreciable property is 23.28%; that the proper normal depreciation reserve for the New York City property as of December 31, 1921, should be not more than $31,315,145; that the reserve already accumulated by the Company is more than $14,000,000 larger than it should be; that the normal depreciation rate for New York City should be 4.56% in 1921; that because the Company has already accumulated a reserve for New York City of $14,000,000 more than is required, the annual allowance for depreciation should be not 4.56% but 3.94% in order that during a long period of years the amount in the depreciation reserve may be gradually brought back to normal; that the charges for depreciation made by the Company in 1921 for the property in New York City are at least $2,000,000 in excess of normal requirements, and that the expenses can be re-

duced by at least this amount; that practically two-thirds of the Company's property in New York State is located in New York City and has been the subject of this investigation.

That under instructions from the Public Service Commission, affiant is now making a similar investigation of depreciation for the property of the New York Telephone Company in New York State, outside of New York City. Whereas this investigation has not been completed, it is the opinion of the affiant that it also will show that the Company has been charging larger expenses for depreciation of its up state property than the facts will justify, and has already accumulated reserves fair in excess of the normal requirements
199 for the depreciable property outside of New York City within the state.

It should be noted that Mr. Wiley's affidavit alleges depreciation expenses in 1921 for property assignable to the Intra State Service of $10,465,722. If no charges for depreciation should be made in the expenses until such time as the Company's depreciation reserve has been brought down to normal proportions, the expenses for the year 1921 as claimed by Mr. Wiley in his affidavit, will be reduced by $10,465,722, and the net telephone revenue increased by the same amount, thus increasing to 8.09% the per cent net annual revenue computed on the company's basis. It is estimated that by eliminating altogether for a period of two or three years the charges for depreciation, the depreciation reserve can be brought down to a normal basis.

Recognizing the fact that since the war, due to temporary abnormal conditions, operating expenses have been excessive Commissions in several cases have followed this principle and have, temporarily, reduced, or eliminated altogether from the expenses, the charges for depreciation. The expenses of the New York Telephone Company were abnormally high in 1920 and 1921, not alone because of the general economic conditions and excessive charges for depreciation but because of two very unusual and temporary conditions prevailing in New York City, and, to a lesser extent, throughout the State. The service became so bad in 1919 and 1920 that extraordinary means were adopted to bring it back to normal. In consequence, the Company was put to excessive and abnormal expenses during 1920 and 1921. During this period the quality of the service was brought back to a condition more nearly normal, and in con-
200 sequence the expenses have been, and will continue to be, greatly reduced. Another temporary condition which has subjected the Company to excessive and abnormal expenses during 1920 and 1921, has been the preparation for the introduction of machine switching equipment. The abnormal expenses from these causes in 1921 in New York City alone are estimated to be upwards of $7,000,000.

(Signed) JAMES G. WRAY.

Sworn before me April 7, 1922.

B. H. BAKER,
Notary Public.

201 *Affidavit of James G. Wray.*

United States District Court, Southern District of New York.

In Equity.

No. 23,252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST and Others, Constituting the Public Service Commission of the State of New York, et al., Defendants.

STATE OF NEW YORK,
Albany County, ss:

James G. Wray, being duly sworn, on oath states: That he is the James G. Wray who made the affidavit herein as to depreciation, verified on April 7, 1922.

That he has examined the affidavit of Jacob S. Wiley, verified March 29, 1922, relating to the revenues and expenses of the New York Telephone Company from intrastate telephone service in New York State.

That the expenses as set forth in Mr. Wiley's affidavit are abnormally large and temporary and should not be used as a basis for determining telephone rates for the future.

202 That he has recently made for the City of New York an extensive study of the operating expenses of the New York Telephone Company in New York City for the years 1920 and 1921, and that some of the results of this study have been submitted to the Public Service Commission and testified to by him.

That this study shows conclusively that the operating expenses in the years 1920 and 1921 have been abnormally high, not alone because of prevailing economic conditions and high price levels, but even more because of the temporary inefficiency of the operating forces and the extensive construction work carried on by the New York Telephone Company during these two years. During 1919 and 1920 the services in New York City became unusually bad and the Company resorted to heroic measures to restore it to normal. An extraordinary amount of telephone switchboards and other equipment was added and the personnel of the operating forces very greatly increased, some departments being doubled in size in a single year. Contemporaneous with the addition of a large number of manual switchboards and the operators to operate them, the Company carried on a very extensive program of construction to provide a new type of automatic telephone equipment technically known as machine switching equipment. The machine switching equipment now being installed (much of it already paid for), the large number of manual switchboards installed during the past two years and now being in-

stalled, and the new buildings for housing such equipment recently completed or now under way, constitute a construction program far in excess of any normal requirements.

That the actual investment in manual central office equipment and other central office equipment related to it, and in buildings in New York City alone, as shown by the Company's books,
203 in excess of normal requirements, was on December 31, 1920, more than $8,000,000 and on December 31, 1921, more than $9,000,000.

That in addition to the foregoing the Company, as shown by its books on December 31, 1921, had spent more than $15,000,000 for central office equipment, both manual and machine switching, under construction, but not yet in service.

That the Company's investment in central office switchboards for exchange service in New York City, as shown by its books, has increased from something over $22,000,000 on December 31, 1919, to more than $52,000,000 (including machine switching equipment under construction) on December 31, 1921, or an increase of about 140%. That during this same period the number of subscribers' lines in service increased only about 15%.

That the annual increases in investment in central office equipment and other central office equipment and buildings in New York City, as shown by the Company's books, and the corresponding increases in the number of subscribers' lines in service shown in the following table, for the past seven years:

Year.	Net annual increase. Investment.	Stations.
1915	1,526,570	33,483
1916	1,524,671	33,231
1917	5,039,191	27,405
1918	3,148,676	19,557
1919	3,177,969	57,514
1920	7,262,200	14,642
1921	*28,000,000	53,985

204 That during the years 1920 and 1921, large increases were made in the personnel of the operating forces and a machine switching school was instituted to train the plant employees in the construction and maintenance of the machine switching equipment now being installed. The number of people in certain departments was doubled in a period of one year. The cost of maintaining the machine switching school in 1920 amounted to over $90,000 and was nearly $18,000 for the month of December, 1920.

That the operating conditions heretofore outlined and the excessive charges for depreciation referred to in another affidavit by affiant, verified April 7, 1922, have resulted in abnormally large operating expenses, the excessive or abnormal operating expenses for the tele-

*Figure is approximate and includes more than $15,000,000 uncompleted construction.

phone service in New York City alone amounting in 1920 to over $5,000,000 and in 1921 to more than $7,000,000.

That on the Company's own basis as set forth in exhibit of Mr. Wiley, the elimination from the total intrastate service expenses of these abnormal and excessive expenses in New York City alone would increase the net revenue from the intrastate service from $2,747,749 to more than $7,790,000 and increase the percent net revenue on the Company's basis from 1.37% to 3.9%.

That for the year 1921 the elimination of these temporary, abnormal and excessive expenses would increase the net telephone revenue from $8,175,180 to more than $15,500,000 and would increase the percent net revenue, on the Company's basis, from 3.52% to 6.7%.

That if no allowance whatever be made for depreciation until the depreciation reserve has been reduced to normal proportions, the net revenue for 1920 would be more than $15,300,000 or a per
205 cent net revenue of 7.6% computed on the Company's basis, and for 1921 would be more than $23,900,000 or 10.4% computed on the Company's basis.

That the foregoing figures have been made for the property in New York City as a whole and that some of them might be reduced by 5% or 6% if computed on the intrastate service basis as set forth in Mr. Wiley's affidavit.

That the deductions for abnormal expenses in 1920 and 1921 made in the foregoing computations are for New York City alone and that if proper deductions for abnormal expenses in New York State, outside of New York City, be made, the foregoing figures for net revenue and per cent net revenue will be considerably increased.

JAMES G. WRAY.

Sworn before me April 7, 1922.

B. H. BAKER,
Notary Public.

206 *Affidavit of Milo R. Maltbie.*

District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,
against
WILLIAM A. PRENDERGAST et al., Defendants.

STATE OF NEW YORK,
County of New York, ss:

Milo R. Maltbie, being duly sworn, deposes and says:

1. That he is a resident of New York City and engaged in business as a public utility consultant, valuing properties of public utilities,

drawing franchises, preparing systems of accounts, making financial, engineering and accounting investigations, drafting rate schedules, negotiating public lighting contracts, and other similar work; that for eight years, he was a member of the Public Service Commission for the First District, New York; that for nearly one year, he was a member of the Advisory Board of the Interstate Commerce Commission, the functions of this Board being to consider and determine questions relating to the work of inventorying and appraising the property of all common carriers under Federal jurisdiction;
207 that for nearly two years, he was City Chamberlain (Treasurer) of the City of New York and adviser to Mayor Mitchel upon utility questions, including telephone rates; that during the War, he negotiated contracts, purchased certain supplies, valued and commandeered property and acted as adviser on various matters for the United States Government, particularly the War Department, the U. S. Shipping Board Emergency Fleet Corporation and the War Industries Board; that during the past seven years, in addition to the above work, he has handled various phases of public utility matters for the Public Service Commission of Pennsylvania, the Minnesota Railroad & Warehouse Commission, the Public Service Commission of the State of New York, the Board of Public Utility Commissioners of the State of New Jersey, the Attorney General of the State of New York, the municipal authorities of over thirty cities, including Boston, Cleveland, Minneapolis, Philadelphia, New York City, Buffalo, Newark, Syracuse, Norfolk, Rochester, Toledo, Savannah and Jersey City, and for many private clients; and that for the conduct of such work, he maintains a staff of engineers, accountants and statisticians.

2. That for many months, he has been engaged for the cities of Buffalo, Syracuse, Rochester, Jamestown and New York City (1) upon an examination and analysis of the books, accounts and financial records of the New York Telephone Company and other companies rendering or having rendered telephone service in these cities, and (2) in directing and supervising the work of engineers upon various features of telephone cases before the Public Service Commission for the Second District and the present Public Service Commission for the State of New York; and that as a result of this
208 and other work, he has become familiar with the accounting methods of the New York Telephone Company, the financial results of its operations, particularly during the period from 1914 to date, and the cost of the property of the New York Telephone Company as shown by its books of account and records.

3. That the telephone business and property of the New York Telephone Company in the City of New York is greatly in excess of the telephone business and property of said Company within that part of the State of New York which is outside of the City of New York; that nearly 70 per cent of the number of telephones in use in the State of New York are located within the City of New York; that about 70 per cent of the operating revenues of said Company collected in the State of New York are from New York City sub-

scribers; that over 50 per cent of the entire plant and equipment of said Company is within the City of New York; and that over 55 per cent of the entire revenues of said Company are collected in the City of New York.

4. That the New York Telephone Company supplies within the City of New York several kinds of telephone service, such as—

a. Exchange service, covering messages between points wholly within the City of New York for which no toll charge per message is made, and equipment used in such service.

b. Inter-zone city service, covering messages between points wholly within the City of New York for which a toll charge is made for each message.

c. Intra-company toll service, covering service between points one of which is within the City of New York and the other without, for which a charge is made separate and apart from the
209 rates for exchange service; equipment used for exchange service is also used for this toll service, and there is very little telephone equipment that is used wholly and exclusively for exchange and inter-zone service.

d. Long distance toll service, covering service between points one of which is within the City of New York and the other without, for which a separate and distinct charge is made and in which service the property of the American Telephone and Telegraph Company is used to greater or less degree; equipment used for exchange service is also used for this long distance toll service.

e. Private wires and facilities between various points, sometimes within and sometimes without the City of New York, for which there is a special schedule of charges.

5. That at least as early as July 1, 1915, the rates to be charged for "local exchange telephone service," using this term for convenience in this affidavit as including private branch exchanges, extensions, auxiliary lines and inter-zone city service, in the City of New York were fixed and ordered by the Public Service Commission for the Second District separately and distinctly apart from the rates for similar and other service in areas served by the New York Telephone Company outside of the City of New York (see Exhibit A attached to plaintiff's bill of complaint); and that from that time to the present, the Public Service Commission for the Second District and its successor, the Public Service Commission for the State of New York, have recognized this differentiation between rates for local
210 exchange telephone service as above described in the City of New York from telephone rates outside of New York City (Exhibits A to E inclusive of plaintiff's bill of complaint).

6. That he has read plaintiff's bill of complaint, exhibits thereto annexed and the moving affidavits for a temporary injunction herein.

7. That nowhere in plaintiff's bill of complaint, or in the exhibits thereto annexed, or in the ten moving affidavits are there alleged facts supporting the averment of plaintiff that the order of the Public Service Commission, dated March 3, 1922, in Case No. 7720, applicable only to the City of New York (Exhibit E) is confiscatory of plaintiff's property used and useful in furnishing the local exchange telephone service covered by said order of the Public Service Commission (paragraph 1, sub-division XI of bill of complaint); that nowhere in plaintiff's bill of complaint does there appear any statement of the revenues, expenditures or net earnings derived in the City of New York from the telephone business affected by said order of March 3, 1922 (Exhibit E); that neither the cost nor the value of the property of the New York Telephone Company within the City of New York devoted to said service is shown; that the few isolated allegations in the affidavits attached to plaintiff's bill of complaint, relating to the City of New York, do not reveal upon what ground plaintiff avers that said order (Exhibit E) is confiscatory; that nowhere in plaintiff's bill of complaint or in the affidavits attached thereto are there any statements to indicate what in the opinion of plaintiff the probable revenues, expenses or net earnings would be within the City of New York for any period in the future
211 during which the rates fixed in said order of March 3, 1922 (Exhibit E) would be in effect.

8. That in "the cost of the property used or" [N. B. not and] "useful in furnishing said service" ["intra-state telephone service"], plaintiff has included property that was not in actual use upon the dates in question (Cf. sub-division VIII of bill of complaint and affidavit of Jacob S. Wiley); and that in the opinion of affiant, this is erroneous and improper.

9. That in determining the amount upon which plaintiff is entitled to a fair return, plaintiff has made no deduction for depreciation or the amount accumulated in depreciation reserves through charges to consumers; and that in the opinion of affiant, such deduction should have been made.

10. That the plaintiff has not informed this Court of the very large reserves and surplus which the New York Telephone Company had upon December 31, 1921; and that according to the records of the New York Telephone Company the following facts appear as of December 31, 1921 for the entire company:

Cost of Fixed Capital	$278,545,677.07
Reserve for Accrued Depreciation	81,541,200.34
Reserve for Amortization of Intangible Capital	952,229.01
Reserve for Contingencies	3,997,952.75
Corporate Surplus Unappropriated	32,581,493.47

11. That these figures show that 43 per cent of the entire cost of fixed capital is represented by depreciation reserves, reserve for contingencies and unappropriated surplus—all of which have been contributed by telephone subscribers over and above operating
212 expenses, taxes, rents, interest and 8 per cent dividends.

12. That the books of account of the New York Telephone Company do not show a separation of reserves and surplus between New York City and the rest of the territory supplied by the New York Telephone Company; but that the New York Telephone Company has submitted to the Public Service Commission an allocation of its depreciation reserves from which, in conjunction with information obtained from the records of the New York Telephone Company, the following facts may be developed for the City of New York as of December 31, 1921:

Cost of Fixed Capital located within the City of New York	$147,491,312.50
Reserves for Accrued Depreciation and Amortization of Intangible Capital allocated to New York City by the Company	44,718,545.89
Investment of security holders plus property built out of surplus earnings over and above interest and 8% dividends	$102,772,766.61

13. That affiant verily believes that of the reserve for contingencies and unappropriated corporate surplus upon December 31, 1921, amounting to $36,579,446.22 (see paragraph 10 above), a very large part is properly attributable to telephone business within the City of New York and that of the total cost of fixed capital of $147,491,312.50, as of December 31, 1921, not over $80,000,000 represents original investment of stock and bond holders of the New York Telephone Company in telephone property used to pro-
213 vide telephone service in the City of New York; and that if to this amount there be added working capital, including cash, materials, supplies, etc., the investment of security holders in New York City telephone property would not exceed $85,000,000.

14. That the average cost for the year 1921 of all property used to supply telephone service in the City of New York, exclusive of working capital, was according to the records of the New York Telephone Company $134,783,432; that the average working and construction capital for the year 1921, including cash, materials, supplies, etc., apportioned by methods believed by affiant to be fair and reasonable, did not exceed $4,644,041, making the total cost of all plant and property used for telephone service within the City of New York not in excess of $139,427,473.

15. That the average amount in the depreciation reserves during the year 1921, according to the apportionment made by the New York Telephone Company, was $41,834,349; that this amount has been contributed by telephone subscribers in the City of New York, through rates that had been charged, principally since 1910; that over and above all these allowances to reserves, operating costs, interest and 8 per cent dividends, the New York Telephone Company has had large surplus earnings upon its business in the City of New

York; that in view of those facts, telephone subscribers should not be called upon to pay rates for telephone service which would yield to the plaintiff a return upon money so contributed; that the amounts in the depreciation reserves should, therefore, be deducted in determining the property upon which telephone subscribers should now be required to pay a fair return; and that the average
214 cost of the property less depreciation reserves for the year is $97,593,124, according to the records of the New York Telephone Company.

16. That as above stated, this amount is greatly in excess of the investment of security holders in telephone property in New York City, unless the amounts in the reserve for contingencies and unappropriated surplus be considered investments of security holders.

17. That the rates charged for local exchange telephone service in the City of New York during the year 1921, were as set forth in Exhibits A to D of plaintiff's bill of complaint; that the revenues from these rates were less than they would have been if the rates in effect from July 1, 1921 to April 1, 1922 had been in full force and effect throughout 1921 by $749,569.

18. That the statement of telephone revenues and expenses for the City of New York during the year 1921, as shown by the records of the New York Telephone Company, is as follows:

Telephone Revenues.

Exchange Service	$49,958,774.83
Toll Service	7,981,316.88
Miscellaneous	419,396.06
Total	$58,359,487.77

215 *Telephone Expenses.*

Current Maintenance	$7,999,247.76
Depreciation and Amortization	6,775,430.49
Traffic	22,151,082.22
Commercial	7,835,680.35
General and Miscellaneous	1,595,898.23
Non-collectible Operating Revenues	85,249.68
Taxes	3,100,788.56
Rent Expense and Deductions	2,515,190.12
4½% Payment to A. T. & T. Co.	2,506,728.71
Total	$54,565,296.12
Net Telephone Revenue	$3,794,191.65
Other Income	*555,958.14
Total Net Income	$4,350,149.79

(*A small part of this amount is obtained by allocations not shown upon the books of the Company.)

19. That affiant believes that the above figures do not show the earnings to be used in determining the fair and reasonable rates to be charged for local exchange telephone service in the City of New York; that the correct earnings for such purpose were considerably in excess of the net income stated above; and that at least the following changes should be made in the revenues and expenses above stated, in order to determine the correct net income for the year 1921 at the rates in effect immediately prior to April 1, 1922:

216 *a.* Increase of exchange service revenues to get an annual basis at the rates in effect from July 1, 1921 to December 31, 1921 $749,569.30

b. Reduction of depreciation and amortization allowances..... 2,000,000.00

In the opinion of affiant, the New York Telephone Company has been accumulating depreciation reserves considerably in excess of the amounts fairly required to protect investors or subscribers. Upon December 31, 1921, ,the New York Telephone Company had over 30 per cent of the total cost of fixed capital in depreciation reserves—an amount greatly in excess of that reasonably required. In 1921, the annual depreciataion allowances (estimated but not spent) were $6,775,430.49. In the opinion of affiant, this amount is excessive by at least $2,000,000, particularly when one considers the large expenditures made for current maintenance in 1921, which represented in part maintenance expenses which should have been incurred in prior years but which had been deferred until 1921.

c. Elimination of Federal income tax..... 259,380.00

In 1921, the New York Telephone Company included in its expenses the above amount, representing its estimate of Federal income tax applicable to New York City business for 1921.

217 *d.* Reduction of payment to American Telephone & Telegraph Company..... $1,800,000.00

The American Telephone & Telegraph Company owns practically all of the stock of the New York Telephone Company. Under an arrangement between the two companies, the New York Telephone Company pays to the American Telephone & Telegraph Company 4½ per cent of its telephone revenues, with certain unimportant exceptions. This arrangement has been the subject of much criticism in proceedings before courts and commissions. It has been disapproved in at least several instances

and the amounts allowed as payment for the service rendered have been as low as 55 cents per telephone. In the opinion of affiant, the amount paid to the American Telephone & Telegraph Company in 1921 greatly exceeds the cost of the service rendered; and is excessive by about $1,800,000.

20. That if the net income given above be adjusted accordingly, the result would be as follows:

Net income given above—paragrah 18		$4,350,149.79
Add:		
	a. Increase in revenues	749,569.30
218	*b.* Decrease in depreciation and amortization	$2,000,000.00
	c. Federal income tax	259,380.00
	d. Decrease in A. T. & T. Co. payment	1,800,000.00
	Total revised net income	$9,159,099.09

21. That in the year 1921 this revised net income available for interest and dividends is—

(*a*) 9.4 per cent of the average cost of the property used to provide telephone service in the City of New York, less the balance in the depreciation reserves ($97,593,124).

(*b*) 6.6 per cent on the average cost of the property with no deduction for depreciation.

(*c*) 10.8 per cent upon the maximum investment directly made by stock and bond holders ($85,000,000).

22. That if payments to depreciation reserves had been suspended in 1921, because such reserves were already grossly excessive, the net income in that year would have been $13,934,529.58, equivalent to 10.0 per cent on the cost of the property used to provide telephone service in the City of New York, without any deduction for depreciataion.

23. That these figures do not show the revenues and expenses of the local exchange telephone service as described above covered by the order of the Public Service Commission dated March 3, 1922
(Exhibi E), which is only a part, although an important
219 part, of the telephone service rendered by the New York Telephone Company in the City of New York.

24. That the New York Telephone Company does not keep its accounts and records to show the value of the property necessarily used to render the service covered by said order or the expenses properly attributable to said service.

25. That in the opinion of affiant, if a proper segregation of the property and allocation of revenues and expenses were made, it

would appear that the telephone service affected by said order of March 3, 1922, would yield a rate of return considerably in excess of the rates shown in paragraphs 21 and 22 above.

26. That the net telephone revenues from all of the telephone business in the entire State of New York, including New York City, for the year 1921, were, according to statements prepared by the New York Telephone Company, $8,462,072.

27. That affiant verily believes that this figure does not show the earnings to be used in determining the fair and reasonable rates to be charged for telephone service in the State of New York; that the correct earnings for such purposes were considerably in excess of the amount stated above; that at least the following changes should be made in order to show the correct earnings for the year 1921 at the rates in effect immediately prior to April 1, 1922:

Net Income given above	$8,462,072
Add:	
a. Increase in revenues	749,569
(For explanation see paragraph 19, sub-division *a*.)	
b. Reduction of depreciation and amortization allowances	3,000,000

220 As explained in paragraph 19, sub-division *b*, in the opinion of affiant, the New York Telephone Company has accumulated depreciation reserves considerably in excess of the amounts fairly required to protect investors or telephone subscribers. In 1921, the annual depreciation allowances (estimated but not spent) were $11,108,891 for the entire State of New York. In the opinion of affiant, this amount is excessive by at least $3,000,000, particularly when one considers the large expenditures made for current maintenance in 1921 and the large depreciation allowances in prior years.

c. Elimination of Federal income tax, at least	$500,000

According to records of the New York Telephone Company, the amount of Federal income tax applicable to the State of New York telephone business for 1921 was over $500,000.

d. Decrease in A. T. & T. Company payment	2,500,000

(For explanation of this item, see paragraph 19, subdivision *d*.)

Total Revised Net Income	$15,211,641

28. That the cost of all property used to supply telephone service in the State of New York, exclusive of working capital, was,
221 according to statements prepared by the New York Telephone Company as of October 31, 1921, $218,287,523, excluding "Other Intangible Capital" of $5,722,932.50, which in the opinion of affiant does not represent property used and useful in the public service; and that a reasonable allowance for working and construction capital, including cash, materials, supplies, etc., would not exceed $7,300,000, making the total cost of all plant and property used and useful for telephone service within the State of New York not in excess of $225,600,000.

29. That the amount in the depreciation reserves as of October 31, 1921, according to statements prepared by the New York Telephone Company, was $68,042,229; that telephone property has been constructed to this amount with funds provided through these reserves which were contributed by telephone subscribers in the State of New York; that over and above all these allowances to depreciation reserves, operating costs, interest and 8 per cent dividends, the New York Telephone Company has accumulated a large surplus; that in view of these facts, telephone subscribers should not be called upon to pay rates for telephone service which would yield to the plaintiff a return upon property not representing an investment of security holders; and that deducting the amount in the depreciation reserves leaves the cost of the property contributed by the security holders at less than $157,600,000.

30. That the revised net income for the entire State of New York as given in paragraph 27 above, represents:

a. 9.6 per cent of the cost of the property used to provide telephone service in the State of New York as of October 31,
222 1921, less the balance in the depreciation reserves ($157,600,000).

b. 6.7 per cent on the cost of said property with no deduction for depreciation.

31. That if payment to depreciation reserves had been suspended in 1921, because such reserves were already excessive, the revised net income in that year would have been $23,320,532, equivalent to 10.3 per cent on the cost of the property used to provide telephone service in the State of New York, without any deduction for depreciation.

32. That it is well known that the cost of labor and materials decreased in 1921 and is still decreasing; that abnormal conditions prevailing in 1921 caused abnormal costs in the telephone industry in New York State; that operating expenses of the New York Telephone Company per unit of service rendered decreased in 1921; and that such costs in the early part of 1922 were less than in 1921.

33. That in the opinion of affiant, during the coming year operating expenses will decrease as compared with 1921; that the decrease for the coming year as compared with 1921 will be at least $2,500,000 in the City of New York and $3,200,000 in the entire State of New York upon the basis of the telephone business done in 1921; that the net income for the City of New York and for the entire State of New York will, therefore, be very much greater under the rates in effect prior to April 1, 1922, than in 1921; and that reductions ordered by the Public Service Commission under date of March 3, 1922 (Exhibits E and F to plaintiff's bill of complaint) will not exceed $1,900,000 in the City of New York and $2,700,000 in the entire State upon the basis of 1921 business.

223 34. That upon the above bases, particularly as the reductions in operating expenses will considerably exceed the said reductions in rates ordered by the Public Service Commission, said orders of March 3, 1922 will allow the Company at least a fair return during the coming year.

MILO R. MALTBIE.

Subscribed and sworn to before me this eighth day of April, 1922.
SARAH J. BLOOM,
Notary Public, New York County.

New York County Clerk's No. 576.
New York County Register's No. 4498.
Commission expires March 30th, 1924.

224 *Affidavit of Adna F. Weber.*

United States District Court, Southern District of New York.

In Equity.

No. 23–252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST and Others, Constituting the Public Service Commission of the State of New York, et al., Defendants.

ALBANY COUNTY, *ss:*

Adna F. Weber, being duly sworn, deposes and says:

That he is fifty-one years of age, resides in Richmond Hill, Borough of Queens, New York City, and is employed as Chief of the Accounting Division of the Public Service Commission.

That he was graduated from Cornell University with the degree of Bachelor of Philosophy in History and Political Science in 1894, and for several years thereafter pursued graduate studies in social

and economic science at American and European universities
225 and received the degree of Doctor of Philosophy from Columbia University in the year 1899.

That he is one of the duly elected Fellows of the American Statistical Association and a member of its committee on the election of Fellows; that he is a member of the American Economic Association and other learned societies; that he has been a contributor to the Quarterly Journal of Economics, the Political Science Quarterly and other scientific journals; that he was for several years a member of the committee on statistics and accounts of the National Association of Railway Commissioners and has been chairman of such committee.

That he was chief statistician of the State Department of Labor, or its predecessor, from 1899 to 1907, and chief statistician, in charge of the Bureau of Statistics and Accounts of the Public Service Commission for the First District from November, 1907, to the time of its abolition in 1921; that his duties in that position included supervision of the examination of financial reports and records of public utility companies, the preparation and interpretation of statistical and accounting regulations, the analysis of financial statements submitted in proceedings before the Commission for the purpose of determining reasonable rates, amount of securities to be authorized for issuance, and other matters wherein the consent of the Commission is required pursuant to the public service commission and railroad laws; that the duties of his present position are of a similar nature.

That he is familiar with the record since April, 1921, in the so-called telephone rate cases (Nos. 377 and 7720) before the Commission; that he has read the bill of complaint and affidavits on application for interlocutory injunction in the present proceeding and believes that the attention of the court may properly be called
226 to certain facts brought out before the Commission that are not disclosed in such affidavits.

In the affidavit submitted by Jacob S. Wiley, General Auditor of the New York Telephone Company, certain computations have been made to show the return realized since 1918 upon investment in telephone property in the State of New York. In computing such return allowance has been made for the expense of depreciation and amortization, but no corresponding allowance has been made in stating the investment. To make such necessary allowance reference should be had to the company's exhibit No. 16, which is as follows:

Case 377.

New York Telephone Company.

Accumulation of Fixed Capital Reserves to October 31, 1921.

For State of New York.

	Appropriation from revenue.	Other additions to reserves.	Charges to reserves.	Net increase in reserves.	Balance in reserves, end of year.
1909	.....	.....	.....	.....	$9,311,301.62
1910	$5,120,544.78	$213,262.25	$3,701,248.30	$1,632,559.00	10,943,860.62
1911	5,421,747.41	154,536.00	3,696,664.73	1,879,618.68	12,823,479.30
1912	5,938,180.61	.....	2,532,982.82	3,405,197.79	16,228,677.09
1913	6,523,874.41	.....	3,809,422.33	2,714,452.08	18,943,129.17
1914	7,031,091.84	—181,432.07	3,231,970.76	3,617,689.01	22,560,818.18
1915	7.481,113.05	82,992.60	2,736,684.71	4,827,420.94	27,388,239.12
1916	7,964,250.66	.....	2,634,539.25	5,329,711.41	32,717,950.53
1917	8,616,571.78	.....	1,773,317.32	6,843,254.46	39,561,204.99
1918	9,518,855.03	21,300.00	2,016,104.26	7,524,050.77	47,085,255.76
1919	9,663,511.00	.....	2,772,733.00	6,890,778.00	53,976,033.76
1920	10,246,439.00	.....	1,901,514.63	8,344,924.37	62,320,958.13
11 Months 1921	9,504,772.33	—27,260.10	3,756,241.36	5,721,270.87	68,042,229.00
	$93,030,951.90	$263,398.95	$34,563,423.47	$58,730,927.38	

AW-H.
November 26, 1921.

228 The exhibit includes the accumulations from the two expense accounts, "Depreciation of Plant and Equipment" and "Amortization of Franchises and Patents," and the income deduction account, "Amortization of Landed Capital," as prescribed in the official classifications of the Interstate Commerce Commission and the Public Service Commission. The nature of these reserves will be readily understood in the light of a simple illustration: A company pays $17,000 for a patent right and charges the cost to the fixed capital account "Patents." As the patent expires and will be worthless at the end of 17 years, its cost must be recovered within that period. If $1,000 a year is charged to expenses, the entire cost will have been ratably distributed over the period of use and fairly assessed against those who enjoy the benefit. At the end of any intervening year, the tenth for example, there will be an accumulation (of $10,000) in the reserve to offset the cost, which for convenience still stands at $17,000 in the fixed capital account; and unless the reserve is subtracted from the fixed capital in determining the rate base, telephone users will be taxed for interest on the $10,000 that they have already repaid to the company, as well as the interest on the $7,000 remaining unpaid.

Depreciation charges to cover the gradual deterioration or exhaustion of physical property are in principle precisely the same, but the factor of salvage has to be considered and the term of service has to be estimated. The result, however, is a gradual recovery of cost through charges to expense, which are accumulated in a reserve until the particular item of plant wears out or is retired from service, when the amount reserved plus the salvage will cancel the entry of cost in the fixed capital account. The fixed capital re-
229 serves are in effect the credit side of the plant or construction account and require equal consideration with the debits that record cost.

From exhibit 16 it appears that the company has collected from its patrons in New York State in this twelve year period (lacking one month) $93,030,951.90 for the purpose of amortizing the cost of telephone plant; in other words, its advances or outlays on property of a perishable nature or limited term of service have to this extent been reimbursed by telephone users in this state. An advance or outlay thus repaid should not continue to draw interest in the form of return upon investment; but the company in effect claims a return upon all but $34,563,423.47 representing the loss on property retired from service. The balance, $58,730,927.38, as well as the $9,311,301.62 accumulated prior to 1910, or a total of $68,042,229, should therefore be subtracted from the total capital outlay to ascertain the unexpired outlay for which the company expects to be reimbursed in the future through charges to its depreciation expense.

Application of the principle above stated was made in a statement introduced in evidence through the testimony of former Public Service Commissioner Milo R. Maltbie, which may be condensed as follows:

230 *Comparison of Return on Telephone Capital and Outside Investments, New York Telephone Company, 1914-1920.*

(Source: Table 135* of Exhibit 200, Case 7720, by Milo R. Maltbie.)

Year.	Average telephone capital.	Net income on telephone plant.	Rate of return, %.	Average outside investment.	Net income thereon.	Rate of return, %.
1914	$126,516,637	$10,727,804	8.48	$97,179,843	$5,461,836	5.62
1915	132,107,334	11,970,550	9.06	94,057,700	5,197,977	5.53
1916	135,625,432	15,757,044	11.62	91,562,598	4,905,566	5.36
1917	143,685,690	15,126,699	10.53	93,603,451	4,867,313	5.20
1918	155,107,313	13,313,534	8.58	94,486,816	5,030,640	5.32
1919	166,551,986	13,992,566	8.40	121,767,234	5,816,024	4.78
1920	174,608,149	6,070,884	3.48	102,743,449	4,640,825	4.52
Total	$1,034,202,544	$86,959,085	8.41	$695,401,094	$35,920,184	5.17

*Fractions of a dollar shown in the original are here omitted.

This exhibit discloses for the seven-year period 1914-1920 an average rate of return of 8.40 per cent on telephone capital represented by tangible fixed capital less fixed capital reserves (both according to the company's records) plus allowances for working and construction cash capital. It further shows that the rate of return on the large amount of investment securities held by the company averaged only 5.17 per cent, with the necessary inference that the 8 per cent dividend rate continuously maintained by the company has been made possible through telephone earnings rather than outside income.

231

In the limited time available it has not been possible to prepare a detailed analysis of investment and income from telephone property in the State of New York, but the accompanying statement, entitled Return on Investment in Telephone Properties in New York State compiled directly from the company's exhibits without change, shows substantially the same results as those in Mr. Maltbie's exhibit. It is to be noted that qualified witnesses before the Commission have challenged numerous items of expense in 1921; and the evidence already given indicates that operations in both 1920 and 1921 were conducted under abnormal conditions that will not govern in future.

The most important of the expense items challenged is the company's estimate of depreciation which is criticized in the affidavit of James C. Wray. Another disputed item is the annual charge to profit and loss account No. 414 for amortization of intangible capital, amounting in the year 1921, for New York State to $454,453.55 (Exh. 114). This account, which is not classified as an expense account by the Interstate Commerce Commission and the Public Service Commission, includes optional amortization, such as organization and intangible capital other than organization, franchises and patent rights; it includes more especially the amortization of the purchase price of acquired telephone properties in excess of their intrinsic structural or replacement value, that is to say, the cost of establishing monopoly.

Return on Investment in Telephone Properties in New York State, 1916-1921.

	1916.	1917.	1918.	1919.	1920.	1921.
Book cost of telephone plant[1] and construction work in progress at first of year (Exh. 3)	$131,662,121	$142,138,691	$158,777,922	$176,411,737	$189,049,801	$219,635,305
Less: Fixed capital reserves (Exh. 16)	27,388,239	32,717,951	39,561,205	47,085,256	53,976,034	62,320,958
Unimpaired investment	104,273,882	109,420,740	119,216,717	129,326,481	135,073,767	157,314,347
Materials and supplies (Exh. 134)	(a) 2,000,000	2,036,673	2,135,041	2,896,515	2,854,771	3,667,310
Rate base	106,273,882	111,457,413	121,351,758	132,222,996	137,928,538	160,981,657
Telephone income (Exh. 17)	11,545,711	11,990,364	10,229,049	10,484,709	2,787,830	8,462,072
Ratio to rate base	10.86	10.76	8.43	7.93	2.02	5.26
Excess over 7%	4,106,539	4,188,346	1,734,426	1,229,097	Def. 6,867,267	Def. 2,806,644
Cumulative excess over 7%	4,106,539	8,294,885	10,029,311	11,258,408	4,391,141	1,584,497

[1] Includes intangible capital per books.
(a) Estimated, as Exhibit No. 134 does not include the date in question.

In comparing the statement of Messrs. Maltbie and Wiley,
233 it should be noted that Mr. Wiley includes and Mr. Maltbie concludes "Construction Work in Progress" as an element of property value or investment. The amount carried by the company under this title includes unfinished construction, not yet placed in the service of the public and not yet producing revenue. The interest charges on such capital are chargeable to the construction account, not to income, and are paid out of the proceeds of capital securities. In the opinion of the affiant, it is error in principle to include these amounts in the rate base.

With materials and supplies, the case is otherwise. The interest on capital thus invested is not chargeable to cost of construction or payable out of capital funds and must consequently be provided for out of telephone income.

Mr. Wiley has included "Working Cash" in his rate base but has failed to include in revenue the accruing interest on bank balances. Mr. Maltbie calculates a smaller amount of working cash and claims no allowance for interest revenue therefrom.

In the affiant's statement of return on investment, no separate allowance was made for working cash on the assumption that the inclusion of "Construction work in progress" was a sufficient offset.

In respect of the rate of return adequate to induce the investment of new capital, the Commission is kept constantly informed through the medium of data submitted by public utility companies in connection with their applications for the consent of the Commission to the issuance of securities, required by law. The general trend of interest rates is indicated in the discount rate of the Federal Reserve Bank of New York which was reduced in the last half of the year 1921
from 6 per cent to 4½ per cent in successive steps of ½ of 1
234 per cent each. The high interest rates of 1919 and 1920 are now of historical rather than practical interest.

A seven per cent return on the entire investment of a public utility company would afford six per cent interest to bondholders and eight per cent dividends to stockholders, if the investment were equally divided between stock and bonds, and more than eight per cent dividends if bonds represented more than one-half the investment or bore a lower rate of interest than six per cent. More than half the funded debt of the New York Telephone Company consists of four and one-half per cent bonds, which do not mature until 1939; there is no known reason for refunding them at a higher interest rate prior to the date of maturity, when interest rates may again be as low as they were before the war.

(Signed) ADNA F. WEBER.

Subscribed and sworn to before me, April 6, 1922.

(Signed) SHERMAN C. WARD,
Notary Public Monroe Co.

Certificate filed in Albany Co.

235 *Affidavit of Edward B. Rogers.*

United States District Court, Southern District of New York.

In Equity.

23-252.

NEW YORK TELEPHONE COMPANY, a Corporation,

against

WILLIAM A. PRENDERGAST and Others, Constituting the Public Service Commission of the State of New York, et al.

STATE OF NEW YORK,
County of New York, ss:

Edward B. Rogers, being duly sworn, deposes and says:

That he is an assistant engineer of the Public Service Commission, State of New York, and that he is now and has been for eleven years last past in charge of the Telephone Bureau of said Public Service Commission.

That he is the same person who made the affidavit, verified April 6, 1922, and heretofore filed in this proceeding; that he is familiar with the annual reports of the said New York Telephone Company filed with the Public Service Commission, and that he is familiar with the evidence taken and exhibits filed in the various telephone rate cases tried before the Public Service Commission during the time he has been associated with said Commission.

236 That he is familiar with the record in the so-called telephone rate cases (Nos. 377 and 7720) now before the Commission.

That he has read the Bill of Complaint and the affidavits on application for an interlocutory injunction in this present proceeding, and is of the belief that the attention of the Court should properly be called to certain facts and exhibits submitted by the New York Telephone Company in evidence before the Commission in said Case No. 377, which facts are not disclosed in the affidavits or the Bill of Complaint in the present proceeding.

That in Case No. 377, the New York Telephone Company submitted exhibit No. 116, a copy of which said exhibit is hereto attached and made a part of this affidavit; that in and by said exhibit, it appeared that the New York Telephone Company had on December 16, 1920, estimated its telephone revenues and telephone expenses for the year 1921; that it estimated its total telephone expenses as $80,723,184, but that the actual results of the year's operation resulted in total telephone expenses of $75,559,311.

That in the same manner and on the same date the said New York Telephone Company estimated its total earnings for the year 1921 to be $584,334 but that the actual results of the year's operation resulted in total net telephone earnings of $8,462,072.

That the New York Telephone Company in Case No. 377, by exhibit No. 121, a copy of which said exhibit is hereto attached and made a part of this affidavit, has estimated its telephone revenues, telephone expenses and total telephone net earnings for the year 1922.

That in the opinion of affiant, such estimates of revenues, expenses and net earnings are and have been frequently incorrect and
237 inaccurate and not in keeping with the results of actual experience.

That said estimates of revenues, expenses and net earnings have been at variance with results of actual experience (exhibit No. 116) in amounts varying from $3,000,000 to $8,000,000.

That the rates of the New York Telephone Company now in effect are rates filed by it; that no changes have been made in said rates so filed by the said Company since September 1st, 1920, except the changes referred to in said Company's Bill of Complaint in this proceeding in Paragraphs IV, V and VI, fols. 9-18, and these changes that have been made are therein referred to by the said Company as "minor" and as "slightly lower rates" (Fol. 15).

That these estimated revenues, expenses and net earnings for 1922 must be and are the basis of the conclusions made by the said New York Telephone Company in the Bill of Complaint in this proceeding, in which the estimated rates of return for 1922 are set forth, particular reference being had to folios 24-26, Paragraph XI, pages 8 and 9.

(Sgd.) EDWARD B. ROGERS.

Subscribed and sworn to before me this 10th day of April, 1922.

(Sgd. MAURICE A. ROTHSTEIN,
Notary Public, Bronx County.

Bronx County Clerk's No. 163.
Bronx County Register's No. 157.
New York County Clerk's No. 977.
New York County Register's No. 3766.

EXHIBIT No. 116.

New York Telephone Company.

Comparison of Estimates with Actual Results of Operations for New York State.

1921.	Original estimate, Dec. 16, 1920.	Revision July 21, 1921.	Actual results.
Telephone Revenues:			
Exchange Revenues (500-506 Incl. 521, 522, 524)	$65,657,500.00	70,235,000.00	67,928,908.00
Toll Revenues (510-516 Incl.)	14,832,000.00	15,985,000.00	15,296,369.00
Total Telephone Revenues	$80,489,500.00	86,220,000.00	83,225,277.00
Telephone Expenses:			
Traffic (620-635 Incl.)	33,494,262.00	29,856,318.00	29,599,299.00
Commercial (640-650 Incl.)	9,880,000.00	10,277,000.00	10,306,199.00
Genl. & Miscellaneous (660-690 Incl.)	2,428,013.00	2,449,951.00	2,282,006.00
Current Maintenance (601-607 Incl. 610)	12,801,000.00	11,300,000.00	11,295,143.00
Depreciation (340, 608)	11,436,857.00	11,32[illegible],209.00	11,108,891.00
Taxes (305)	4,416,932.00	5,068,634.00	4,382,344.00
Other Expenses (304, 320, 310-334 Incl. 337, 341 less tax on tax exempt bonds, 527 Minus 523)	5,808,067.00	6,281,047.00	6,127,376.00
Miscellaneous deductions from surplus applicable to operations.	*458,053.00	*458,053.00	458,053.00
Total Telephone Expenses	$80,723,184.00	77,015,212.00	75,559,311.00
Net Telephone Earnings	—233,684.00	9,204,788.00	7,665,966.00
Sunday Earnings Applicable to Operations (401, 310, 311, 525)	818,018.00	804,629.00	796,106.00
Total Net Telephone Earnings	584,334.00	10,009,417.00	8,462,072.00

*Actual—No estimate made of this item.

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EXHIBIT No. 121.

(To Take Place of Ex. 95.)

New York Telephone Company.

Forecast of Earnings for Year 1922.

New York State.

(Account Numbers Shown in Parentheses.)

Telephone Revenues:		
Exchange Revenues (500-506 Incl., 521, 522, 524)		$73,069,000
Toll Revenues (510-516 Incl.)		16,907,000
Total Telephone Revenues		89,976,000
Telephone Expenses:		
Traffic (620-635 Incl.)		30,252,000
Commercial (640-650 Incl.)		11,535,000
General and Miscellaneous (660-690 Incl.)		2,471,000
Current Maintenance (601-607 Incl.)		12,100,000
Depreciation (340, 608)		12,800,000
Taxes (305)		5,392,500
Other Expenses (304, 320, 330-334 Incl.) (341, 527 minus 523)		6,566,000
Amortization of Other Intangible Capital (414)		425,000
Total Telephone Expenses		81,541,500
Net Telephone Earnings		8,434,500
Sundry Earnings applicable to operations (310, 311, 525)		760,000
Total Net Telephone Earnings		9,194,500
Book Balance of Telephone Property, December 31, 1921		252,404,508
Total Addition to property during year 1922, (estimated)	$42,137,800	
Average Addition for 1922		21,068,900
Average Book Balance of property 1922		273,473,408
Per Cent of Estimated Total Net Earnings to average Book Balance		3.36%

A. W.–H.

February 3, 1922.

240 *Affidavit of Adna E. Weber.*

United States District Court, Southern District of New York.

In Equity.

23-252.

NEW YORK TELEPHONE COMPANY, a Corporation,

against

WILLIAM A. PRENDERGAST and Others, Constituting the Public Service Commission of the State of New York, et al.

STATE OF NEW YORK,
County of New York, ss:

Adna F. Weber, being duly sworn, deposes and says:

That he is the same Adna F. Weber who made an affidavit previously filed in this proceeding. That he is familiar with the record, and the evidence and exhibits, submitted by the New York Telephone Company in Case No. 377, in which the temporary order of March 3, 1922, was made by the Public Service Commission.

That as appears by Exhibit No. 71, submitted by said New York Telephone Company, the stockholders' actual investment in the New York Telephone Company as of October 31, 1921 was $166,000,000.

That since 1896 dividends have been paid to stockholders at a composite rate for the entire period of 8.17%.

241 That since 1909 dividends have been paid at a rate of 8% or greater in each year.

That in addition to a depreciation reserve balance of $80,624,649.76 on October 31, 1921, (Exhibit 15), the New York Telephone Company had surplus or undivided profits in the sum of $36,867,369.64, of which $15,840,633.99 had been accumulated between 1895 and December 31, 1909, and $21,026,735.65 had been accumulated since 1909 (Exhibit 44).

That copies of said exhibits (15, 44, 71) are hereunto attached and made a part of this affidavit.

(Signed) ADNA F. WEBER.

Subscribed and sworn to before me this 11th day of April, 1922.

(Signed) MAURICE A. ROTHSTEIN,
Notary Public, Bronx County.

Bronx County Clerk's No. 163.
Bronx County Register's No. 157.
New York County Clerk's No. 977.
New York County Register's No. 3766.

EXHIBIT No. 15.

New York Telephone Company.

Accumulation of Fixed Capital Reserves to October 31, 1921.

	Appropriation from revenue.	Other additions to reserves.	Charges to reserves.	Net increase in reserves.	Balance in reserves, end of year.
1909.....	.....	.....	.....	.....	$10,615,991.81
1910.....	$6,085,800.00	$253,611.16	$5,176,584.20	$1,162,826.96	11,778,818.77
1911.....	6,524,445.27	324,704.08	4,346,137.14	2,503,012.21	14,281,830.98
1912.....	7,118,701.22	.....	3,019,415.00	4,099,286.22	18,381,117.20
1913.....	7,847,550.15	.....	4,374,791.48	3,472,758.67	21,853,875.87
1914.....	8,479,626.75	200,000.00	4,634,590.97	3,645,035.78	25,498,911.65
1915.....	9,009,416.12	94,000.00	3,201,446.18	5,901,969.94	31,400,881.59
1916.....	9,598,391.36	.....	3,204,854.19	6,393,537.17	37,794,418.76
1917.....	10,431,624.42	.....	2,326,982.82	8,104,641.60	45,899,060.36
1918.....	11,497,112.08	27,000.00	2,436,678.75	9,087,433.33	54,986,493.69
1919.....	11,730,409.59	.....	3,326,865.71	8,403,543.88	63,390,037.57
1920.....	12,454,008.28	.....	2,450,705.78	10,003,302.50	73,393,340.07
10 Months 1921.....	11,557,842.67	21,000.00	4,305,532.98	7,231,309.69	80,624,649.76
	$112,334,927.91	$478,315.24	$42,804,585.20	$70,008,657.95	

A. W.–H.
November 25, 1921.

EXHIBIT No. 44.

New York Telephone Company.

Analysis of Surplus Account, 1896 *to October* 31, 1921.

	Credits.				
	Transferred from income.	Miscellaneous.	Total credits.	Debits.	Balance Dec. 31.
1896	$298,348.84	.....	$298,348.84	.....	$298,348.84
1897	588,904.96	.....	588,904.96	.....	887,253.80
1898	1,180,958.74	.....	1,180,958.74	.....	2,068,212.54
1899	1,182,404.42	.....	1,182,404.42	.....	3,250,616.96
1900	840,293.72	.....	840,293.72	$3,000,000.00	1,090,910.68
1901	1,418,497.78	.....	1,418,497.78	.....	2,509,408.46
1902	292,232.91	.....	292,232.91	.....	2,801,641.37
1903	167,185.81	.....	167,185.81	.....	2,968,827.18
1904	2,852,616.25	.....	2,852,616.25	.....	5,821,443.43
1905	3,233,576.18	.....	3,233,576.18	.....	9,055,019.61
1906	2,830,401.08	.....	2,830,401.08	4,334,569.96	7,550,850.73
1907	3,024,052.81	.....	3,024,052.81	599,371.33	9,975,532.21
1908	3,053,659.10	.....	3,053,659.10	819,675.78	12,209,515.53
1909	2,754,704.05	$18,601,762.27	21,356,266.32	17,725,147.86	15,840,633.99
1910	3,633,512.58	816,476.68	4,449,989.26	5,971,198.49	14,319,424.76

Analysis of Surplus Account, 1896 to October 31, 1921.—Continued.

	Credits.				
	Transferred from income.	Miscellaneous.	Total credits.	Debits.	Balance Dec. 31.
1911	2,827,194.22	81,625.58	2,908,819.80	185,134.35	17,043,110.21
1912	4,343,848.76	78,524.00	4,422,372.76	3,375,659.47	18,089,823.50
1913	4,184,244.41	107,388.27	4,291,632.68	1,965,098.27	20,416,357.91
1914	2,709,087.82	53,031.91	2,762,119.73	39,638.02	23,138,839.62
1915	3,798,713.83	27,324.90	3,826,038.73	33,551.37	26,931,326.98
1916	7,265,341.02	9,960.66	7,275,301.68	1,421,763.90	32,784,864.76
1917	6,377,490.14	78,486.29	6,455,976.43	211,891.01	39,028,950.18
1918	4,109,503.11	100,334.96	4,209,838.07	224,107.27	43,014,680.98
1919	3,207,162.67	112,095.95	3,319,258.62	3,521,875.67	42,812,063.93
1920	.....	238,412.74	238,412.74	6,549,361.73	36,501,114.94
31 Oct., 1921	723,698.79	71,868.41	795,567.20	429,312.50	36,867,369.64

AW-H.

December 7, 1921.

EXHIBIT No. 71.

New York Telephone Company.

Statement of Dividends Paid on Stockholders' Actual Investment.

Consideration Received for Capital Stock Issued.

Date.	Amount of consideration.	Equivalent investment for one year.	Average stockholders' investment for one year.	Amount of dividends.	Average rate of dividends, %.
June 1, 1896	$11,987,000 (Par Value) (See Note)	$6,976,040.98	.....	.....	....
June 22	13,000	6,819.67	.....	.....	....
26	400,000	205,464.48	.....	.....	....
July 10	1,000,000	475,409.80	.....	.....	....
Oct. 30	600,000	101,639.30	.....	.....	....
Balance Dec. 31, 1896	14,000,000	.....	$7,765,374.23	$720,000.00	9.27
July 14, 1897	190,905	88,914.66	.....	.....	....
17	109,095	49,914.70	.....	.....	....
Oct. 15	300,000	63,287.67	.....	.....	....
Balance Dec. 31, 1897	14,600,000	.....	14,202,117.03	960,000.00	6.76

Statement of Dividends Paid on Stockholders' Actual Investment.—Continued.

Date.	Amount of consideration.	Equivalent investment for one year.	Average stockholders' investment for one year.	Amount of dividends.	Average rate of dividends, %.
July 15, 1898	300,000	138,904.11	.....	.....	....
Oct. 13	190,905	41,319.16	.....	.....	....
15	109,095	23,014.56	.....	.....	....
Balance Dec. 31, 1898	15,200,000	.....	14,803,237.83	960,000.00	6.49
Balance Dec. 31, 1899	15,200,000	.....	15,200,000.00	960,000.00	6.32
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Apr. 16, 1900	800,000	567,671.23	.....	.....	....
Oct. 15	51,555	10,875.98	.....	.....	....
16	1,063,125	221,363.00	.....	.....	....
17	535,320	109,997.20	.....	.....	....
17	3,000,000	616,438.30	.....	.....	....
Balance Dec. 31, 1900	20,650,000	.....	16,726,345.71	4,620,000.00	27.62
Apr. 13, 1901	354,375	254,373.28	.....	.....	....
15	195,625	139,349.31	.....	.....	....
July 15	532,815	246,700.64	.....	.....	....
18	17,185	7,815.64	.....	.....	....
Oct. 15	550,000	116,027.39	.....	.....	....
Balance Dec. 31, 1901	22,300,000	.....	21,414,266.26	1,800,000.00	8.41

Jan. 15, 1902	550,000	527,397.26			
Apr. 15	550,000	391,780.82			
July 15	550,000	254,657.53			
Oct. 15	550,000	116,027.39			
Dec. 31	2,000,000				
Balance Dec. 31, 1902	26,500,000		23,589,863.00	3,800,000.00	16.11
Mar. 2, 1903	5,500,000	4,580,821.92			
2	1,000,000	832,876.71			
Apr. 15	750,000	534,246.57			
July 15	750,000	347,260.27			
Oct. 15	750,000	158,219.18			
Balance Dec. 31, 1903	35,250,000		32,953,424.65	5,000,000.00	15.17

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Jan. 15, 1904	$750,000	$719,262.29			
Apr. 15	750,000	532,786.88			
July 15	750,000	346,311.47			
Oct. 15	750,000	157,786.88			
Balance Dec. 31, 1904	38,250,000		37,006,147.52	3,000,000.00	8.11
Balance Dec. 31, 1905	38,250,000		38,250,000.00	3,000,000.00	7.84
Apr. 10, 1906	1,750,000	1,270,547.90			
Balance Dec. 31, 1906	40,000,000		39,520,547.90	3,000,000.00	7.59
Balance Dec. 31, 1907	40,000,000		40,000,000.00	3,000,000.00	7.50

Statement of Dividends Paid on Stockholders' Actual Investment.—Continued.

Date.	Amount of consideration.	Equivalent investment for one year.	Average stockholders' investment for one year.	Amount of dividends.	Average rate of dividends, %.
June 1, 1908	4,000,000	2,327,868.80	.....	.....	....
Balance Dec. 31, 1908	44,000,000	.....	44,327,868.80	3,000,000.00	7.09
Jan. 22, 1909	4,000,000	3,758,904.11	.....	.....	....
May 10	2,000,000	1,287,671.23	.....	.....	....
Sept. 30	30,247,500	7,624,027.39	.....	.....	....
30	Par Value (See Note) 5,425,300 Par Value (See Note)	1,367,472.88	.....	.....	....
Balance Dec. 31, 1909	85,672,800	.....	58,038,075.61	4,963,456.00	8.55
May 16, 1910	28,557,600	17,916,960.00	.....	.....	....
July 13	9,546,100	4,472,282.47	.....	.....	....
14	1,223,500	569,849.31	.....	.....	....
Balance Dec. 31, 1910	125,000,000	.....	108,631,891.78	8,712,488.00	8.02
Balance Dec. 31, 1911	125,000,000	.....	125,000,000.00	10,0000,000.00	8.00
Balance Dec. 31, 1912	125,000,000	.....	125,000,000.00	10,0000,000.00	8.00
Balance Dec. 31, 1913	125,000,000	.....	125,000,000.00	10,0000,000.00	8.00

Balance Dec. 31, 1914	125,000,000	.....	125,000,000.00	10,0000,000.00	8.00
Balance Dec. 31, 1915	125,000,000	.....	125,000,000.00	10,0000,000.00	8.00
Balance Dec. 31, 1916	125,000,000	.....	125,000,000.00	10,0000,000.00	8.00
Balance Dec. 31, 1917	125,000,000	.....	125,000,000.00	10,0000,000.00	8.00
July 1, 1918	25,000,000	12,534,246.57	.....	.....	....
Balance Dec. 31, 1918	150,000,000	.....	137,534,246.57	11,000,000.00	8.00
Balance Dec. 31, 1919	150,000,000	.....	150,000,000.00	12,000,000.00	8.00
Balance Dec. 31, 1920	150,000,000	.....	150,000,000.00	12,000,000.00	8.00
June 1, 1921	16,000,000	9,336,986.30	.....	.....	....
Balance Oct. 31, 1921	166,000,000	.....	159,336,986.30	9,426,666.67	8.00
Grand Total	.....	.....	1,982,300,393.19	161,922,610.67	
Composite Rate of Dividends	.....	.....	.....	.....	8.17

NOTE.—All stock was issued for cash at par except the three issues bearing references to this note. In these cases the stock was issued for telephone property carried on the books at a figure equal to or greater than the par value of the stock issued as follows:

248 Date.	Par value issued.	Property received (book figures).	Name of company.
June 26, 1896	$11,987,000	$11,987,000.00	Metropolitan T. & T. Co., and Westchester Tel. Co.
Sept. 30, 1909	30,247,000	33,975,192.27	N. Y. & N. J. Tel. Co.
Sept. 30, 1909	5,425,300	8,049,200.66	Bell Tel. Co. of Buffalo.

For the purpose of this statement the par value of stock issued has been substituted for the consideration received in connection with these issues.

CAW—H. December 16, 1921.

249 *Affidavit of James G. Wray.*

United States District Court, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST and Others, Constituting the Public Service Commission of the State of New York, et al., Defendants.

STATE OF NEW YORK,
County of New York, ss:

James G. Wray, being duly sworn, deposes and says:

That he is the same James G. Wray referred to in the affidavit on depreciation verified April 8, 1922 and previously submitted in the proceeding.

That he has examined the affidavit of Mr. Andrew Sangster, verified March 29, 1920 purporting to show the methods of apportionment of property, revenue and expenses of the New York Telephone Company in New York State, between the interstate toll service and the general intrastate telephone service.

That the New York Telephone Company's property in the State of New York, the revenues derived therefrom and the expenses
250 caused are from a variety of services among which are the following:

1. Local exchange telephone service given in each separate community.

2. Intercommunity toll service within New York State given over the New York Telephone Company's own toll lines.

3. Intercommunity interstate toll service given over the New York Telephone Company's own toll lines.

4. Intracity or zone toll service furnished principally in New York City.

5. Intrastate toll service furnished by the New York Telephone Company over the long distance lines of the American Telephone and Telegraph Company.

6. Interstate long distance toll service furnished by the New York Telephone Company over the lines of the American Telephone and Telegraph Company.

7. Leased wire or private line service either telephone or telegraph.

8. Extra territorial local exchange service for which mileage charges are made.

9. Installation charges.

10. Rental of ducts, poles, wires or other equipment to other companies.

11. And other miscellaneous services.

That a very large proportion of the property of the New York Telephone Company in New York State is devoted to practically all of the above-mentioned services.

251 That a considerable proportion of the total property is devoted to two or more of these services and some of it to only one service.

That the general intrastate telephone service includes the interstate long distance service furnished over the lines of the American Telephone and Telegraph Company.

That Mr. Sangster fails to show that he has made any apportionment of the New York Telephone Company's property because of its use in the long distance telephone service of the American Telephone and Telegraph Company.

That proper apportionments of property, revenues and expenses on account of the long distance service of the American Telephone and Telegraph Company is a matter of very great importance and will involve the consideration of many millions of dollars in revenues, expenses and in the investment in property.

That Mr. Sangster's affidavit fails to show that any consideration was given to the long distance service of the American Telephone and Telegraph Company, the property of the New York Telephone Company used in furnishing such long distance service, the revenues accruing to the New York Telephone Company from such service, or the expenses caused by it.

That Mr. Sangster nowhere presents the method or methods followed by him in determining the "extent of use" of each class of property as apportioned by him between the interstate toll service and the general intrastate telephone service. Neither does he offer any explanation as to the way in which he apportions the expenses of the company between these two broad classes of service.

252 That he has apportioned the investment in Station Equipment, Account No. 230 on the basis of its use for interstate toll service and all intrastate service respectively.

That he has assigned subsidiary exchange conduit to the intrastate service exclusively, notwithstanding the fact that subsidiary exchange conduit like the station equipment is devoted to the use of both interstate and intrastate service.

That on page 2 of his affidavit, Mr. Sangster refers to "the property of the plaintiff used or useful in the rendition of its telephone service in the State of New York and devoted exclusively to that service" but fails to show what methods of apportionments and allocations were used by him in determining the amount of property used or

useful (note he does not say used and useful), devoted exclusively to the telephone service in the City of New York.

That the apportionments of property and expenses made by Mr. Sangster to the intrastate service are apparently made to include both the interstate toll service (including the American Telephone and Telegraph Company's long distance service) and the local exchange service.

That the rate schedules fixed by the Commission in its order of March 3, 1922, were made to apply only to the local exchange service. That to properly test the adequacy of the local exchange rates, further apportionment of property and expenses must be made to divide the property and expenses of the general intrastate service between the interstate toll service (both long distance service over the lines of the American Telephone and Telegraph Company and toll service of the New York Telephone Company) and the local exchange service and that further allocations and apportionments of the property, revenues, and expenses must be made before the
253 reasonableness of the local exchange rates can be ascertained.

(Signed) JAMES G. WRAY.

Subscribed and sworn to before me this 10th day of April, 1922.

(Signed) MAURICE A. ROTHSTEIN,
Notary Public, Bronx County.

Bronx County Clerk's No. 163.
Bronx County Register's No. 157.
New York County Clerk's No. 977.
New York County Register's No. 3766.

254 *Affidavit of James G. Wray.*

United States District Court, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST and Others, Constituting the Public Service Commission of the State of New York, et al., Defendants.

STATE OF NEW YORK,
County of New York, ss:

James G. Wray, being duly sworn, deposes and says:

That he is the same James G. Wray who has made affidavits previously submitted in this proceeding.

That he is familiar with the evidence and exhibits in the case and

has examined the order of the Commission and the memorandum accompanying it which sets forth the reasons for reducing the rates.

That the New York Telephone Company in common with other associated telephone companies of the Bell System provides for depreciation according to what is known as the straight line method.

It claims that its annual charges for depreciation are intended
255 to amortize the dollars actually invested, when the property or any of its parts have been retired or abandoned because of losses suffered through wear and tear not covered by current maintenance, through inadequacy resulting from the growth of the property and the demands for additional service, through obsolescence resulting from changes or advances in the art or through public demand requiring changes in character or location of property or class of service and through the destruction of property by extraordinary casualties.

That the Company in applying the straight line method of depreciation undertakes to spread the cost of each structure or piece of apparatus (less estimated net salvage) over the probable period of service to the end that those subscribers who get the use and enjoyment of the facility shall reimburse the Company for its cost.

That the application of this method briefly is as follows:

From the actual or estimated original cost of the plant or property element retired, taken at 100%, is subtracted the net salvage value realized (the gross salvage less the cost of removing the property retired), stated as a percentage of the original cost, and this result is divided by the average life of the property in years (usually estimated or computed from such facts as are available). The quotient is the annual rate stated in per cent which applied to the cost of the property will, during the life of the property, amortize the net losses of the property at a uniform rate during the period that the property is in use.

That this method of treating the cost of capital consumed in operation is obviously the correct method of apportioning
256 to the revenue of a particular period its share of the burden imposed by the destruction or exhaustion of capital.

That it is the method adopted 15 years ago by the Interstate Commerce Commission and the two former New York Commissions in the accounting rules which they prescribed pursuant to law for the use of the several classes of public utilities under their supervision, and that substantially all of the other state Commissions as well as the Income Tax Administration have followed the same course.

That in letter dated March 18, 1920, from Mr. McGinty, the Secretary, to all Carriers concerned (quoted by Mr. Whittemore in his affidavit) the Interstate Commerce Commission stipulates that the Company shall continue the practice of handling depreciation as originally prescribed by the Commission in 1912, and set forth in the Uniform System of Accounts. In consequence the Company is not required to maintain the high depreciation rates heretofore and now in effect. It is still free to alter these rates as may be justified by its actual experience.

That Mr. Whittemore in his affidavit nowhere makes the claim that the depreciation rates set forth therein are proper rates.

That Mr. Whittemore, who was a Company's witness in the proceedings before the Commission in both Case No. 7720 involving telephone rates for New York City and in Case No. 377 involving state wide telephone rates has testified that the depreciation reserve already accumulated would appear to be adequate and in his judgment should be stabilized at about 30% of the cost of the depreciable property and that in consequence charges for depreciation in the future might be somewhat reduced.

257 That the composite depreciation allowance authorized by the U. S. Government during the period of Federal control was 5.72% of the average cost of depreciable property as shown by the Company's books. That this composite percentage results from larger percentages applied to short lived property and smaller percentages applied to long lived classes of property, such as fire proof buildings, underground conduit and underground cables. That the New York Telephone Company's property includes proportionately a larger percentage of such long lived property than is to be found in the property of the Bell Telephone System as a whole. That in consequence the depreciation rate for the property of the New York Telephone Company should be less than for the Bell Telephone properties as a whole. That on the contrary the annual rate charged for depreciation for the Bell properties as a whole for the five months immediately following Federal control (see American Telephone and Telegraph Company Annual Report for 1919, page 40) was 5.78%. The corresponding rates charged by the New York Telephone Company on this property within New York City was 5.82% in 1920, and 5.81% in 1921.

That the depreciation rates applied by the New York Telephone Company for each of the various classes of property have on the average not been reduced since August 1, 1918, notwithstanding the fact that changes in economic conditions have since that time operated to reduce the requirements for depreciation. For example due to the advances of the art during recent years and the expansion of telephone properties in all communities, the average life expectancy of most of the classes of property and of the property as a whole is increasing. Furthermore, under the accounting

258 methods followed by the Company materials withdrawn from the plant and later used again are charged against the property at current prices for such materials. At the prevailing high prices the Company enjoys high salvage values. The increase in life of the property elements and the higher salvage values realized both operate to reduce the current requirements for depreciation. The rates were actually increased by the Company August 1, 1919, when Government control ceased.

(Sgd.) JAMES G. WRAY.

Subscribed and sworn to before me this 10th day of April, 1922.

(Sgd.) MAURICE A. ROTHSTEIN,
Notary Public, Bronx County.

Bronx County Clerk's No. 163.
Bronx County Register's No. 157.
New York County Clerk's No. 977.
New York County Register's No. 3766.

259 District Court of the United States, Southern District of New York.

In Equity.

No. 23–252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST, WILLIAM R. POOLEY, CHARLES VAN Voorhis, Oliver C. Semple, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission, and Charles D. Newton, Attorney General of the State of New York, Defendants.

Replying Affidavits of Plaintiff on Application for Interlocutory Injunction.

Charles T. Russell,
Stetson, Jennings and Russell,
Solicitors for Plaintiff.

John L. Swayze,
John W. Davis,
Of Counsel.

U. S. District Court, S. D. of N. Y. Filed Apr. 15, 1922.

E

260 District Court of the United States, Southern District of New York.

In Equity.

No. 23–252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of James A. Stewart in Reply to Answering Affidavit of Adna F. Weber, Verified April 6, 1922.

STATE OF NEW YORK,
County of New York, ss:

James A. Stewart, being duly sworn on oath states that he is the James A. Stewart who made the affidavit herein verified March 29, 1922; that he has read the affidavit of Adna F. Weber filed herein and verified April 6th, 1922; that in contrast with the technical accounting theories set up in the said affidavit the concrete facts in the instant case are as follows:

The plaintiff company had in January, 1922, property used or useful in the rendition of its intrastate telephone service in the state of New York which had cost, as shown by the affidavit of Jacob S. Wiley herein, $246,197,865 and the fair value of which was then, as shown by the affidavits of George W. Whittemore and Halbert P. Gillette, from $323,000,000 to $350,000,000.

261 This property constitutes a large telephone plant, made up of a great many tangible items which can be seen and counted.

The value of this property is something which must be determined by the consideration of the factors affecting value, such as cost, cost of reproduction, capitalization, and revenue. Such value is entirely independent of and unaffected by theories as to accounting.

Much is said in the affidavit in question as to what is shown by the books of the plaintiff company. The facts as to cost as shown by these books are not controverted by the defendant's affidavits. The value of this property is not a variable factor, subject to change on account of changing theories of accounting. It would be exactly the same if the plaintiff's books were destroyed.

JAMES A. STEWART.

Subscribed and sworn to before me this 14th day of April, 1922.
[SEAL.]
LINCOLN JONES,
Notary Public, Kings Co., No. 3.

Cert. filed in N. Y. Co. No. 50.
Kings Co. Register No. 4004.
N. Y. Co. Register No. 4045.

262 District Court of the United States, Southern District of New York.

In Equity.

No. 23–252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of Jacob S. Wiley in Reply to Answering Affidavit of Adna F. Weber, Verified April 11, 1922.

STATE OF NEW YORK,
County of New York, ss:

I, Jacob S. Wiley, being duly sworn on oath state that I am the Jacob S. Wiley who has already made two affidavits in this suit; that I have read the affidavit of Adna W. Weber herein, verified April 11, 1922; that included in the evidence and exhibits submitted by the New York Telephone Company in case #377, with which the said Weber states that he is familiar, was an exhibit known as Exhibit #2, a copy of which is attached to and made a part of this affidavit; that the $166,000,000, stated by said Weber to be the stockholders' actual investment in the plaintiff company as of the date of the balance sheet, said Exhibit #2 attached hereto, appears from said balance sheet to be the amount of the palintiff's outstanding capital stock at that time, so that this investment as so stated by said Weber does not include the following items shown on said balance
263 sheet, each of which represents money invested in the plaintiff's property, namely:

Funded debt	$91,350,055.00
Advances from system corporations for construction, etc.	58,500.383.11
Bills payable	4,859,800.00
Accounts payable	13,320,604.60
Total	$168,030,842.71

A portion of the items "accounts payable," so small as to be immaterial, may have been on account of current expenses and not on account of construction.

That the said evidence and exhibits, with which the said affiant Weber states that he is familiar, also show that Exhibit 15, attached to his said affidavit, relates to the plaintiff's telephone property in the states of New Jersey and Connecticut as well as its property in the state of New York, and, further, show that Exhibit 44, the analysis of the plaintiff's surplus account, relates to the property of the plaintiff which, in addition to the telephone properties above referred to, is shown by the said balance sheet to include much addi-

tional property of which one item is investments in securities $119,628,623.03.

It will be noted by reference to the balance sheet hereunto attached that the surplus there shown and referred to in the affidavit of the said Weber amounted to approximately 8% of the total of the assets shown by the said balance sheet, and that the period during which this surplus was built up is twenty-five years.

JACOB S. WILEY.

Subscribed and sworn to before me this 14th day of April, 1922.

[SEAL.] LINCOLN JONES,
Notary Public, Kings Co., No. 3.

Cert. filed in N. Y. Co. No. 50.
Kings Co. Register No. 4004.
N. Y. Co. Register No. 4045.

264 EXHIBIT No. 2.

New York Telephone Company.

Balance Sheet as of October 31, 1921.

Assets.

Intangible Capital	$6,435,743.16
Right of Way	3,307,076.49
Land and Buildings	38,186,710.10
Central Office Equipment	49,336,303.97
Station Equipment	42,694,561.14
Exchange Lines	97,690,529.45
Toll Lines	29,345,476.65
Other Plant	1,510,868.08
General Equipment	3,834,784.69
Total Fixed Capital	$272,342,053.73
Construction Work in Progress	23,600,215.93
Investment in Securities	119,628,623.03
Advances to System Corporations for Construction, etc.	17,530,627.96
Miscellaneous Investments	185,939.87
Cash and Deposits	5,699,496.57
Marketable Securities	291,261.81
Bills Receivable	5,578,800.00
Accounts Receivable	8,424,573.35
Material and Supplies	3,763,918.39
Accrued Income Not Due	311,941.45
Sinking Fund Assets	758,837.19
Prepayments	1,491,882.39
Unamortized Debt Discount and Expense	479,913.93
Other Deferred Debits	197,179.14
Total Assets	$460,285,264.74

Liabilities.

Capital Stock—Common	$166,000,000.00
Funded Debt	91,350,055.00
Advances from System Corporations for Construction, etc.	58,500,383.11
Bills Payable	4,859,800.00
Accounts Payable	13,320,604.60
Accrued Liabilities Not Due	6,371,227.61
Liability for Employees' Benefit Fund	1,979,838.70
Other Deferred Credit Items	411,336.32
Reserve for Accrued Depreciation	79,692,578.66
Reserve for Amortization of Intangible Capital	932,071.10
Surplus	36,867,369.64
Total Liabilities	$460,285,264.74

EPP—H.

November 26, 1921.

265 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of Frankland Briggs in Reply to Answering Affidavit of Milo R. Maltbie, Verified April 8, 1922.

STATE OF NEW YORK,
County of New York, ss:

Frankland Briggs, being duly sworn, deposes and says that he is the Frankland Briggs who made the affidavit herein, verified March 29th, 1922.

That he has carefully read the affidavit of Mr. Milo R. Maltbie herein, verified April 8, 1922; that in paragraph 11 of the said affidavit said affiant, referring to the amounts shown in the accounts of the plaintiff as reserves for depreciation and for contingencies and as its unappropriated surplus, states:

"all of which have been contributed by telephone subscribers over and above operating expenses, taxes, rents, interest and 8% dividends."

and makes similar statements elsewhere in said affidavit. That, as a matter of fact, the telephone subscribers of the plaintiff have never

contributed to it anything on account of said accounts or on
263 account of operating expenses, taxes, rents, interest or dividends; that the only payments which have ever been made to the plaintiff by its subscribers have been payments at legal rates made by them on account of and in payment for services rendered to them by the plaintiff; that such amounts as have been appropriated by the plaintiff to provide for its expense on account of depreciation, or to provide for its other expenses, or to surplus, or to dividends, have been so appropriated by it out of its own moneys earned by it and paid to it as aforesaid.

That the said Maltbie, in his said affidavit, does not state or consider the present fair value of the property of the plaintiff used or useful in the rendition of the service covered by the orders of the Public Service Commission which are in controversy, nor does he state or consider the present fair value of such property within The City of New York, nor does he deny any of the statements contained in the affidavit of Jacob S. Wiley filed herein as to the actual cost of said property, or the statements contained in the affidavits of George W. Whittemore and Halbert P. Gillette filed herein as to the value of said property.

That the affidavit of the said Maltbie nowhere contains any statements as to what, if any, net return upon its fair value the plaintiff has at any time derived or probably will at any time derive from the operation of its telephone property in the state of New York.

That, in so far as the said affidavit attempts to compute what have been the returns to the plaintiff from its telephone business within the state of New York or to estimate what said returns will be, it assumes as the basis for such computations, not the fair value of the property established as such basis by the decisions of the supreme court of the United States, but another and different basis, which the affiant says in his opinion should be adopted for such purposes.

267 Referring to paragraph 8 of the said affidavit, in the affidavit of Wiley therein referred to the rule established by Judge Hand in the Consolidated Gas Company case, that property used or useful includes property in course of construction, was followed by said Wiley and that the difference between him and the said Maltbie upon this question grows out of the fact that said Maltbie has not applied this rule, which he states he considers "erroneous and improper."

Referring to paragraph 9 of the said affidavit of the said Maltbie, attention is called to the affidavits of Whittemore, and Gillette, filed herein, in which it affirmatively appears that in arriving at the present fair value of the plaintiff's property such depreciation as has occurred therein was taken into account.

That none of the computations as to the returns from plaintiff's business which are made by the affidavit of the said Maltbie have for their basis either the present fair value of the property in question or the actual expenses incurred by plaintiff in transacting its business, as shown by its books of account.

FRANKLAND BRIGGS.

Subscribed and sworn to before me this 14th day of April, 1922.
[SEAL.] LINCOLN JONES,
Notary Public, Kings Co., No. 3.

Cert. filed in N. Y. Co. No. 50.
Kings Co. Register No. 4004.
N. Y. Co. Register No. 4045.

268 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of George W. Whittemore in Reply to Answering Affidavit of James G. Wray as to Depreciation, Verified April 7, 1922.

STATE OF NEW YORK,
County of New York, ss:

I, George W. Whittemore, being duly sworn on oath state that I am the George W. Whittemore whose two affidavits, both verified March 29, 1922, have been filed herein. I further state that I have read the affidavit of James G. Wray in this matter, verified on April 7th, 1922, as to depreciation.

That in the statement in the affidavit of said Wray as to depreciation (fol. 13, typewritten copy) as follows:

"Notwithstanding this fact the New York Telephone Company at the close of the period of government control increased the depreciation rate from 5.72% to 5.82% for the year 1920 and 5.81% for the year 1921."

which statement in substance is elsewhere repeated by him, the said Wray was probably misled by my failure to state in my earlier
269 affidavit that the depreciation rates, 5.82% for the year 1920 and 5.81% for the year 1921, were not applied to the same base to which the depreciation rate of 5.72 during the year of government operation was applied. The assumption of the affiant Wray that the actual comparable depreciation rate applied by the plaintiff company for the year 1920 and the year 1921 was higher than 5.72% is erroneous; that adjusting the depreciation rates for the years 1920 and 1921 to the base to which the percentage for the year of government operation was applied, the comparable rate applied by the plaintiff company for the year 1920 is 5.60% and for the year 1921, 5.58%.

Referring to the statement of the affiant Wray in folio 14 (type-

written copy) of his said affidavit, as to the increase of "the unexpended balance in the depreciation reserve" of plaintiff since 1914 as compared with the increase in its investment since that time, there is and can be no fixed relation or ratio between the amount of the investment and the amount of such credit balance. The theoretical, normal operation of the account entitled "Reserve for Accrued Depreciation" contemplates that the reserve will gradually and uniformly grow until at the end of the life of any specific property the reserve for that property is 100% of the amount of the investment, less salvage. Were it not for the disturbances brought about by new investments and by increases in the total investment, the amount in the reserve would gradually approach the total amount of the investment.

Referring to the averments in folios 15 and 16 (typewritten copy) of the affiant Wray's said affidavit, this deponent states that the plant of the plaintiff company has been growing very rapidly, especially within recent years; that property is taken out of service and its cost charged to the account in question, not at uniform intervals or in uniform amounts but at irregular intervals
270 and in irregular amounts, as the service requires. There is a like lack of uniformity in the making of additions to the plant. These do not come in equal periodical amounts but come in varying amounts at irregular intervals. Because these two accounts, that is, the account entitled "Reserve for Accrued Depreciation" and the fixed capital accounts, are subject to these irregularities it is obvious that there cannot be any fixed ratio prevailing between them. In my opinion, there is no such thing as a fixed proper ratio of depreciation reserve to depreciable property. On the contrary, this ratio on account of the irregularities referred to must always be a variable factor.

The problem is to provide during the life of the property for its cost, less net salvage, so that by the time the property is used up its cost is charged to operating expenses. These factors determine the adequacy or inadequacy of this account. This question is not affected by the ratio which the balance in the account bears at any particular time to the cost of the depreciable property.

That the conclusion stated by said affiant in his said affidavit, folio 17 (typewritten copy), that no adopt a depreciation rate less than adequate would reduce the expenses of the company, is a fallacy. It would reduce the charge to the operating expenses but the actual expense of the company on this account would remain unchanged, so that what is suggested by said affidavit is a modification of accounting practices which would result in making the accounts show less operating expenses than those actually incurred.

In folio 19 (typewritten copy) of affiant Wray's said affidavit it is suggested that if no charge to operating expenses on account of depreciation had been made for the year 1921, the operating expenses for that year would have been reduced in the sum of $10,465,722 and the net revenue would have been increased by a like
271 amount. By a parity of reasoning if no charges whatever had been made to operating expenses for the year 1920 the

net revenue for that year would have been increased by an amount equal to the total operating expenses for that year. The plaintiff has not this control over the amount of its operating expenses. The operating expenses actually incurred determine what the entries upon the books should be. Entries arbitrarily made on the books cannot increase or decrease the actual expense of operation.

GEORGE W. WHITTEMORE.

Subscribed and sworn to before me this 14th day of April, 1922.
[SEAL.] LINCOLN JONES,
Notary Public, Kings Co., No. 3.

Cert. filed in N. Y. Co. No. 50.
Kings Co. Register No. 4004.
N. Y. Co. Register No. 4045.

272 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of James A. Stewart in Reply to Answering Affidavits of James G. Wray as to Expenses.

STATE OF NEW YORK,
County of New York, ss:

I, James A. Stewart, being duly sworn on oath state that I am the James A. Stewart who made the affidavit herein verified on March 29th, 1922; that I have read the two affidavits of James G. Wray, verified April 7, 1922; that it has been the policy of the plaintiff company, upon the grounds of both economy and service, to have at all times a reasonable amount of surplus plant, so that the requirements of its subscribers for service may be at all times promptly met; that prior to the conditions which arose during the recent war the average time required by a subscriber to secure the installation of a telephone by the plaintiff was less than seven days; that the war very largely increased the demands for the plaintiff's service and rendered it impossible for the plaintiff, through the addition of new plant, to maintain the surplus capacity of its plant which its policy demanded. On this account and because of the difficulty in
273 obtaining and retaining telephone operators the ability of the plaintiff to furnish telephones promptly as required and to give efficient service were for a time substantially impaired.

The effect of this situation upon the ability of the plaintiff to furnish service is indicated by the numbers of unfilled applications made to the plaintiff for service and existing at the various dates indicated, as shown below:

	New York City.	Entire State of New York.	Entire territory of company.
Dec. 31, 1918.....	1,136	1,315	1,394
Dec. 31, 1919.....	36,931	37,394	40,069
Dec. 31, 1920.....	86,581	94,058	116,627
Dec. 31, 1921.....	50,363	53,223	70,697
Mar. 31, 1922.....	46,108	48,889	60,905

That in the localities where the shortage of facilities was greatest it was common for applicants to be compelled to wait for months before their applications could be filed, and in some instances they were required to wait as long as two years and a half.

That the plaintiff has succeeded in restoring its service and, as shown by my former affidavit, is and has been expending large amounts of money in order to provide the facilities necessary to restore a surplus of facilities, so that plaintiff may be enabled to resume its practice of providing service to applicants promptly upon receipt of their applications; that the decrease in the number of unfilled applications indicates progress already made in this direction.

That the abnormal conditions which the plaintiff has been compelled to meet in performing its function of rendering telephone service, are those incident to the war and to the period of readjustment which began when the war ended.

It is denied that the maintenance expenses and cost of operating the switchboards in the City of New York in 1920 and 1921, as compared with like current expenses or with like expenses which
274 may reasonably be expected in the future, are abnormal.

Over 80% of the increased cost of maintenance and of handling traffic in those years, as compared with similar expenses in even 1913 and 1914, were the result of increases in the wage scales alone, which increases were strongly recommended by the Second District Commission, the predecessor of the present Commission. Inasmuch as such scales were not increased to the extent prevailing in other industries, no immediate material change in his respect can be expected.

It is true that the force of operators in The City of New York was largely increased in 1919 and 1920 to make up for the very large shortage in the forces which existed at the beginning of this period and to care for the increase of about 130,000 stations, and the increase in the number of calls from about 800,000 existing stations which took place during these years. This shortage of operators resulting from war conditions was primarily responsible for the poor service in 1919 and the early part of 1920.

It is to meet the situation that the plaintiff company, since the beginning of 1920 has been carrying on a very large construction

program. The amount of new construction necessarily affects, to some extent, the operating expenses.

It is denied that the expenditures for new construction in 1920 and 1921 were abnormal as compared with those now being made currently or those which it is expected will be made within the next five years. Commitments for new equipment have already been made for 1922 and 1923, which, together with the expenditures necessary to place it in service, will exceed for those years the expenditures made in 1920 and 1921. This new plant is necessary to provide for deferred applications now on hand and to furnish new applicants with service within a reasonable time.

275 The installation of the so-called machine switching equipment is not a temporary condition, as new switch boards of this type will be necessary to provide for the growth of the business and later for the replacement of existing manual equipment. The training of employees to operate and maintain this equipment will be a continuing process and its annual cost for many years will exceed the figures given in Mr. Wray's affidavit. It is also a fact that schools have been and are maintained for training employees to operate and maintain the existing type of equipment and there is no reason to expect that it will not be necessary to maintain indefinitely similar schools for employees operating and maintaining the new type of equipment.

That nowhere in the affidavit of the affiant Wray is there set out the criterion which he accepts and adopts as his basis in his statement that certain expenses have been abnormal. As a matter of fact the expenses incurred and the investments made are the actual expenses and investments deemed necessary by the plaintiff to meet the actual conditions which have confronted and which now confront it in the rendition of its service. I know of no reason to anticipate that in the near future there will be any material change in these actual conditions.

That the estimates set out in the concluding paragraphs of the Wray expense affidavit (fols. 13, 14, 15 and 16, typewritten copy) do not purport to be based upon present facts or existing conditions, nor are the assumptions underlying them set out with sufficient detail to permit their accurate analysis.

JAMES A. STEWART.

Subscribed and sworn to before me this 14th day of April, 1922.
[SEAL.] LINCOLN JONES,
Notary Public, Kings Co., No. 3.

Cert. filed in N. Y. Co. No. 50.
Kings Co. Register No. 4004.
N. Y. Co. Register No. 4045.

276 District Court of the United States, Southern District of New York.

In Equity.

No. 23—252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Defendants.

Further Replying Affidavit of Jacob S. Wiley.

STATE OF NEW YORK,
County of New York, ss:

I, Jacob S. Wiley, being duly sworn, on oath state that I am the Jacob S. Wiley who verified an affidavit herein on March 29th, 1922.

In my said affidavit the statement of net revenues for the periods designated was based upon the depreciation rate filed by the plaintiff with the Interstate Commerce Commission. If the composite rate 4.56% alleged by the affiant Wray to be the proper rate, were substituted, the percentage of net revenue would not be largely increased, as is shown by the following statement, which repeats the figures contained in my original affidavit and adds for the purpose of comparison the results which would have followed if the said Wray basis had been adopted:

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	Original Wiley affidavit.		On Wray basis.	
	Net revenues.	% return.	Net revenues.	% return.
1919. Year	$10,215,266	5.72	$11,813,322	6.62
1920. Year	2,747,749	1.37	4,325,894	2.16
1921. 1st Quarter.....	708,087	1.29*	1,141,492	2.09*
2nd "	3,405,693	6.01*	3,853,422	6.80*
Last Half.....	4,061,400	3.41*	4,973,461	4.18*
1921. Year	8,175,180	3.55	9,968,375	4.33
1922. January	721,807	3.52*	884,595	4.31*

	Amount by which net revenues as shown in Wiley affidavit have been less than 8%.	Amount by which net revenues substituting depreciation expense of Mr. Wray would have been less than 8%.
1919. Year	$4,061,182	$2,463,126
1920. Year	13,257,099	11,678,954
1921. 1st Quarter	*14,675,096	*12,941,476
2nd "	* 4,517,900	* 2,726,984
Last Half	*10,934,022	* 9,109,900
1921. Whole Year	10,265,260	8,472,065
1922. January	*11,034,145	* 9,080,689

JACOB S. WILEY.

Subscribed and sworn to before me this 14th day of April, 1922.
[SEAL.] LINCOLN JONES,
Notary Public, Kings Co., No. 3.

Cert. filed in N. Y. Co. No. 50.
Kings Co. Register No. 4004.
N. Y. Co. Register No. 4045.

278 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Defendants.

Affidavit of Andrew Sangster in Reply to Answering Affidavit of James G. Wray, Verified April 10, 1922, *Relating to Former Affidavit of said Andrew Sangster.*

STATE OF NEW YORK,
County of New York, ss:

I, Andrew Sangster, being duly sworn on oath state that I am the Andrew Sangster who made the affidavit herein, verified March 29th, 1922.

That I have carefully read the affidavit of James G. Wray herein, verified April 10, 1922, commenting upon my said affidavit.

That the various kinds of service mentioned in the said Wray affidavit as furnished by the plaintiff company in the State of New

*Computed on an annual basis.

York are subdivisions of the intrastate and interstate service referred to in my said affidavit.

That in the first sentence in folio 6 (typewritten copy) of the said Wray affidavit there is an obvious error in connection with the use of the words "intrastate" and "interstate."

While it is true, as stated in said folio 6 (typewritten
279 copy), that my affidavit does not affirmatively show that in making the apportionment in question use of the property in connection with the long distance telephone service of the American Telephone and Telegraph Company was taken into account, this use was in fact taken into account in making said apportionment.

Referring to the statement in the said Wray affidavit, at the end of folio 7 (typewritten copy), "neither does he offer any explanation as to the way in which he apportions the expenses of the company between these two broad classes of service," reference is made to my former affidavit, in which it is shown as to each item of expense the basis adopted for its apportionment.

In the second paragraph of folio 8 (typewritten copy) of the said Wray affidavit reference is made to the statement in my former affidavit "su' sidiary exchange conduit is devoted to intrastate exchange service exclusively." This is a clerical error. As a matter of fact, this conduit is used in both intrastate and interstate service, and it was apportioned between these two services in the apportionment described in my former affidavit.

That the apportionment of property and expenses made by me to the intrastate service did not include interstate toll service, and the statement to that effect in the said Wray affidavit, folio 9 (typewritten copy) is incorrect unless the word "interstate" is to be read "intrastate" because of a clerical error.

The word "interstate" in folio 10 (typewritten copy) of the said Wray affidavit is also apparently a clerical error for "intrastate."

Referring to the statement in folio 9 (typewritten copy) of the said Wray affidavit, that my former affidavit fails to show what methods of apportionments and allocations were used in determining the amount of property used or useful devoted exclusively
280 to the telephone service in The City of New York, a reference to my former affidavit will show that the separation in question did not include any separation of the City of New York from the remainder of the State of New York.

ANDREW SANGSTER.

Subscribed and sworn to before me this 14th day of April, 1922.

[SEAL.] LINCOLN JONES,
Notary Public, Kings Co., No. 3.

Cert. filed in N. Y. Co. No. 50.
Kings Co. Register No. 4004.
N. Y. Co. Register No. 4045.

281 *Opinion.*

District Court of the United States, Southern District of New York.

Before Hough, C. J.; A. N. Hand, and Knox, D. JJ.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST, WILLIAM R. POOLEY, CHARLES VAN Voorhis, Oliver C. Sample, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission, and Charles D. Newton, Attorney General of the State of New York, Defendants.

Suit vs. the Public Service Commission of the State of New York et al. to restrain the enforcement of two orders of said Commission dated 3d March, 1922, making "temporary decreases" in the rates to be charged for service by the New York Telephone Company in the City of New York and most of the rest of the State.

The bill of complaint prays that the rates prescribed by said orders or either of them be declared confiscatory, and therefore in violation of the Constitution of the United States; also for injunctions appropriate to such declaration.

282 A temporary restraining order having been obtained, this application for injunctions pendente lite comes on to be heard pursuant to Sec. 266, Judicial Code.

John W. Davis and John L. Swayze for plaintiff;

Ledyard P. Hale for the Public Service Commission;

Charles D. Newton, Attorney General of the State of New York pro se;

John P. O'Brien, Corporation Counsel, and M. Maldwin Fertig filed a brief for the city of New York as amicus curiæ.

Per Curiam:

The legal principle is admitted, viz: That plaintiff, like every public utility concern, is entitled to an "income equivalent to a fair return upon its property dedicated to public use";—or, what is the same thing, to a "fair return upon the reasonable value of such property at the time it is being used for the public."

The orders complained of are called "temporary," but the description is immaterial if they are really confiscatory. As matter of law there is no difference between the permanent and temporary confis-

cation or deprivation of that to which the complaining party is entitled,—in this case a fair return.

What amount of money is a fair return depends primarily upon the value of the investment, and in ascertaining such value, cost is but one element, though an important one.

In ascertaining such cost the account books of plaintiff, long kept in accordance with the requirements both of the Interstate Commerce Commission and Public Service Commission, furnish evidence;—a point which we regard as settled by the recently concluded litigation over the gas supply of New York City.

We find it therefore, if not admitted, not seriously opposed,
283 that at the beginning of 1922, the cost (including working capital) of plaintiff's plant in the State of New York and devoted to telephone uses was in excess of $240,000,000.

The only statement in opposition to the foregoing (it can hardly be called evidence) is the opinion of Mr. Maltbie to the effect that, taking cost as of October, 1921, and adding a reasonable allowance for "Working and construction capital," the total cost of all plaintiff's plant "used and useful for telephone service within the State of New York" did not exceed $225,600,000.

As new construction has been and is extensive, the difference between the two statements is negligible.

Owing to the nature of plaintiff's business the items and sources of its gross income are unusually easy of comprehension, and have not been made the subject of dispute. Such income is obtained (in a certain sense) by rendering bills at stated periods, for telephone service, to upwards of 787,000 persons, corporations, etc., in the State of New York.

The average bill to each customer may easily be computed, and is rendered for so much telephone service at tariffs or rates long charged by plaintiff and approved by the public authorities. The reductions decreed by the orders complained of are (as to the larger portion of these bills) expressed by a percentage, wherefore it follows that (assuming a normal increase in "stations") the effect of said orders is asserted to be a decrease in the income of plaintiff from business done within the State of New York by a sum per year of not less than $2,900,000.

284 Whether the undoubted loss (be the same greater or less than this figure) will reduce the plaintiff's return upon its property below the point of fairness largely depends upon present condition as shown by past performance.

During the year 1921 it had a gross revenue from intra-state business of $80,032,204. From which, after deducting what is regarded as "telephone expenses" there remained a net revenue of $8,175,180. It is so evident as to dispense with discussion, that to deduct anything from this net revenue (if correctly stated) is to leave a most unfair return even on cost; therefore defendants attack what plaintiff calls expenses. They substantially transfer certain portions of so-called expense to profit, and in the following manner:

(1) Plaintiff has for years charged as expense against gross revenue certain sums to "Depreciation and Amortization." By so doing a fund has been created for replacements or permanent repairs. For some years past the average depreciation rate for various kinds of equipment or property has not varied much from 5.80%. But not all repairs and replacements are made at once; i. e., if a certain amount of depreciation is charged to Expense in the year 1921, it does not follow that all of such charge is expended in that year. Consequently there arises a "Reserve for accrued depreciation," or, what may be called,—a balance of unexpended depreciation reserve. This balance now held by plaintiff had reached a much larger sum than the Public Service Commission thinks should exist. Therefore it is asserted, in justification of the orders complained of that plaintiff should lower its rate of depreciation so as to set aside for (say) the year 1922, $3,000,000, less than did the rate of 1921 and preceding years. This bookkeeping measure would of course increase net income by the sum just stated.

285 (2) Plaintiff is a controlled company, i. e., its stock is substantially owned by the American Telephone & Telegraph Company. How long this relationship has existed is not shown, but it is admitted that plaintiff pays, and has charged annually as an expense, certain license fees payable to said controlling Company. Defendants assert that such license fees are much too great and should be decreased by $2,500,000, annually; thereby again increasing (as matter of bookkeeping) the net annual revenue of plaintiff by that amount.

(3) Plaintiff has consistently charged as an annual item of expense the so-called Income Tax collected by the United States, amounting to substantially, $500,000.00. Defendants assert that as against the regulatory power of the State of New York, such tax is not to be regarded as an expense in calculating a fair return.

It is thus seen that the orders complained of substantially mean this: the Commission says to plaintiff, we do not challenge the mere arithmetic of your bookkeeping, but we do assert that by your own showing you have received in the recent past and will receive in the near future Six Million dollars a year which you have charged to expense which you ought to carry to income. Therefore, if you do what you ought to do, and transfer that sum to income you will have a fair return upon your investment notwithstanding the reductions we have ordered.

We note as matters debated at bar the following:

(A) The deductibility from gross income of the so-called
286 U. S. Income Tax is established by Galveston, etc. Co. vs. Galveston (U. S. C. Co., April 10, 1922).

(B) The amendment or addition to the Interstate Commerce Act contained in the Transportation Act 1920 (41 Stat., 456) has expressly vested in the Interstate Commerce Commission power and authority to prescribe for (inter alios) this plaintiff, what depreciation charges may properly be included under operating expenses,

and the percentages of depreciation which shall be charged with respect to each class of property belonging to corporations subject to the Act.

We have no doubt that this is a matter which Congress may lawfully entrust to the Interstate Commerce Commission; and that where like powers are given to the National Commission by Congress, and to State tribunals by a Legislature, the authority of the former is exclusive (People ex rel. New York Central vs. Public Service Commission, Ct. of App. March 7, 1922).

We are advised by the record that the Interstate — Commission is now engaged in a nation-wide investigation of this matter of depreciation and depreciation reserve. But whether that Commission has as yet exercised its authority in respect of this particular plaintiff is a matter as to whether we do not find it necessary to express opinion; and therefore assume for purposes of argument that as yet regulatory power remains in the Public Service Commission in this regard:—pending action by the Interstate Commerce Commission.

(C) It is not asserted by plaintiff that it is entitled to a return, or to any income from its unexpended depreciation reserve or
287 accumulations of depreciation charges (Louisiana vs. Cumberland, etc. Co., 212 U. S., 414). Plaintiff has rested for purposes of argument upon the actual cost of producing a property now serving the public, and by all the evidence in superior condition.

Nevertheless in respect of plaintiff's property, the Court is bound to recognize as a matter of common knowledge that the present value less depreciation or its replacement cost as depreciation, is at the present moment far greater than the cash expenditures of past years in producing that which now exists. (Lincoln, etc. Co. vs. Lincoln, 250 U. S., 256 (267).

(D) As this Court held in Brooklyn etc. Co. vs. Nixon, Feb. 10, 1920, eq. 16-110:

"The question for our present consideration is not whether plaintiff enjoyed remunerative returns of prior years which were perfectly legal, but whether at the present time it is receiving and is likely to receive in the future a fair return upon its invested capital."

Invested capital is convertible with the phrase "Capital upon which a return is to be expected," and that does not include (as pointed out above) accumulated depreciation reserve. It is now, however, not denied that the depreciation charges producing the present accumulations, were lawful when made and as made, and as such they have passed into the general mass of defendants' property.

(E) This is not a case wherein the rate prescribed and
288 complained of must necessarily be given time in order to show results; for the present rate-making is really an attack not upon the present charge to the public, per se, but upon the expense accounting of the plaintiff.

We now, state, however, the results according to the contentions of defendants.

The rate from which a reduction is made prevailed throughout the last half of 1921. During that time (according to its own system of accounting) the plaintiff's net telephone revenue was $4,061,400.

It follows that under the same rates and without any expansion or increase in telephone calls, a year's business would be	8,122,800
Assume that to this be added by transfer from depreciation and license charges ut supra	5,500,000
There results an assumed income for 1922 of	$13,622,800
But it is computable, has been computed and is not denied that if the reductions now ordered had prevailed during the whole of the year 1921, there would have resulted a loss of income of	1,700,000
So that the income allowed by the Commission is not greater than	11,922,800

And it will be noted that the assumed loss of $1,700,000 is computed in part upon the income of the first quarter of 1921, when the rates prescribed were considerably lower than during the other three quarters of that year; so that the stated loss of $1,700,000 is a confessed underestimate. This is materially less than 6% upon Mr. Maltbie's estimate of the cost of plaintiff's plant.

289 But in considering what is a fair rate, it is to be observed that no computation can reduce the basis for return much below $300,000,000.

That is to say the cost of reproduction less depreciation is (as above stated) considerably more than that sum; while the cost of reproduction new, less the plaintiff's accumulated reserve for depreciation and amortization, also amounts to substantially the same $300,000,000.

We do not undertake to make a rate, but we are of opinion that such a return as is hereinabove indicated, admitting arguendo all the foregoing contentions of the defendants (excepting the matter of Federal Income Tax) is not and cannot possibly be a fair return for any business like the telephone business in or near the State or City of New York at the present time.

Injunctions may go as prayed for.

Dated May 23, 1922.

CHAS. M. HOUGH,
C. J.

AUGUSTUS N. HAND,
D. J.

JNO. C. KNOX,
D. J.

Endorsed: U. S. District Court, S. D. of N. Y. Filed May 26, 1922.

290 *Restraining Order.*

At a Term of the United States District Court Held in and for the Southern District of New York in the Post Office Building, New York City, on the 12th Day of June, 1922.

Present:

Hon. Charles M. Hough, Circuit Judge.
Hon. Augustus N. Hand, District Judge.
Hon. John C. Knox, District Judge.

In Equity

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST, WILLIAM R. POOLEY, CHARLES VAN Voorhis, Oliver C. Semple, Charles G. Blakeslee, the persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission, and Charles D. Newton, Attorney General of the State of New York, Defendants.

This cause came on to be further heard before the Honorable Charles M. Hough, Circuit Judge of this circuit, the Honorable Augustus N. Hand and the Honorable John C. Knox, District Judges of this district, pursuant to the order herein dated and filed on the 30th day of March, 1922, upon the motion of the plaintiff for a preliminary injunction as prayed for in the bill of complaint herein, and not less than five days' notice of the hearing of said motion having been given to the Governor of the State of New York and to each of the defendants herein, and said motion having been argued by counsel for all of the parties,

Now, after considering the pleadings in the cause and the affidavits of James A. Stewart, Jacob S. Wiley, Andrew
291 Sangster, George W. Whittemore, Halbert P. Gillett, Harry M. Addinsell, Arthur D. Welch, Frankland Briggs and Seymour L. Andrew, submitted on behalf of the plaintiff, and the affidavits of William A. Prendergast, Edward B. Rogers, James G. Wray, Milo R. Maltbie and Adna F. Weber, submitted on behalf of the defendants, and the Court being of opinion that a preliminary injunction should be awarded in this cause as prayed for by the plaintiff in the bill of complaint herein, it is accordingly

Ordered, adjudged and decreed, that the defendants, William A. Prendergast, William R. Pooley, Charles Van Voorhis, Oliver C. Semple, Charles G. Blakeslee, the persons constituting the Public

Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission; and Charles D. Newton, Attorney General of the State of New York, be and they are hereby severally enjoined and restrained pending the trial and determination of this cause and until the further order of this Court from attempting to compel the plaintiff, its officers, agents and employees, to observe or put in force the rates for telephone service prescribed by the two orders made by the Public Service Commission of the State of New York on March 3, 1922, and set forth in the bill of complaint herein, or either of the said orders, and that the defendants be and they are hereby enjoined and restrained until the further order of the Court from taking any steps or proceedings against the plaintiff, its officers, agents or employees, to enforce any penalties or any other remedy against the plaintiff for disregarding the rates prescribed by said orders or either of them.

This preliminary injunction shall not take effect until the plaintiff shall file with the Clerk of this Court a good and sufficient bond with the American Telephone and Telegraph Company as
292 surety, or with other good and sufficient surety, in the penal sum of Six Million Dollars ($6,000,000), conditioned upon the payment to the defendants of all costs and damages which may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained hereby, and further conditioned upon the repayment by the plaintiff to each or any of its subscribers or to the persons entitled thereto, with interest, in such way and manner as the Court may hereafter direct, any sums paid by said subscribers to the plaintiff pending this suit for telephone service rendered such subscribers subsequent to March 31, 1922, in excess of the sums chargeable to said subscribers or any of them pursuant to the provisions of the said orders of the Public Service Commission the enforcement of which is hereby enjoined, in the event that this injunction shall be hereafter dissolved; and it is

Further ordered, that all bills sent by the plaintiff to its subscribers during the pendency of this suit for telephone service to which the rates prescribed by the said orders of the Public Service Commission made on March 3, 1922, would have applied shall, commencing with bills sent in the month of August, 1922, bear a statement on the face thereof in the words following: "keep this bill (see reverse side)", and on the reverse side of such bills there shall be printed a notice in substantially the following form: "notice to subscribers. If the suit instituted by the company in the U. S. District Court is dismissed you may be entitled to a refund and this bill will be evidence of the amount for which you have been charged"; and such bills sent in the month of July, 1922, shall have enclosed therewith a printed card or paper setting forth a notice to the same effect.

C. M. HOUGH,
C. J.
AUGUSTUS N. HAND,
D. J.
JNO. C. KNOX,
D. J.

Endorsed: U. S. District Court, S. D. of N. Y., Filed June 13, 1922.

293 *Bond.*

A Bond with the New York Telephone Company as principal, and the Amercian Telephone and Telegraph Company as surety, in favor of the Public Service Commission of the State of New York, in the sum of Six Million Dollars, dated June 14, 1922, approved by Hon. John C. Knox, United States District Judge, was filed in the United States District Court, S. D. of N. Y. on June 15, 1922.

294 *Order.*

At a Stated Term of the United States District Court for the Southern District of New York Held at the Federal Building, in the City of New York, on the 30th Day of June 1922.

Present: Hon. Julius M. Mayer, U. S. Circuit Judge, duly designated.

District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST, WILLIAM POOLEY, CHARLES VAN VOORHIS, Oliver C. Semple, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission, and Charles D. Newton, Attorney General of the State of New York, Defendants.

On reading and filing the annexed affidavit of Charles D. Newton, verified June 29, 1922, and upon motion of Wilber W. Chambers, Solicitor for Defendant, Charles D. Newton, Attorney General of the State of New York, it is

J. M. M. Ordered, that the answer [and answering affidavits]* of the defendants Public Service Commission and their counsel heretofore filed with the clerk of this Court [and used in opposition to plaintiff's motion for an interlocutory in-

J. M. M. junction order herein]*, be and the same hereby [are]* is deemed and made the answer [and answering affidavits of]* defendant Charles D. Newton, as Attorney General of the State of New York, in this cause with like force and effect as if a

[*Erased in copy.]

separate answer [and separate answering affidavits
J. M. M. have]* had been presented and filed by said defendant, Charles D. Newton, Attorney General, [upon the
295 J. M. M. hearing of said motion for an interlocutory injunction order.]* and defendant Newton as Attorney General is not required to file a further answer.

JULIUS M. MAYER,
Circuit
United States [District] Judge.*

June 30, 1922.

Endorsed: U. S. District Court, S. D. of N. Y. Filed June 30, 1922.

296 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST, WILLIAM POOLEY, CHARLES VAN VOORHIS, Oliver C. Semple, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission, and Charles D. Newton, Attorney General of the State of New York, Defendants.

Petition for Appeal and Allowance.

To the Honorable Judges of the United States District Court for the Southern District of New York, and the Honorable Charles M. Hough, Circuit Judge Sitting with Them Pursuant to Section 266 of the Judicial Code:

Now come William A. Prendergast, William R. Pooley, Charles Van Voorhis, Oliver C. Semple and Charles G. Blakeslee, the persons constituting the Public Service Commission of the State of New York, and Ledyard P. Hale, Counsel to said Commission, and Charles D. Newton, Attorney-General of New York, defendants in the above entitled cause, and feeling themselves aggrieved by the interlocutory order or decree of this court entered in said cause on the 13th day of June, 1922, awarding to the plaintiff a preliminary injunction herein as prayed for by the plaintiff in its bill of complaint, do hereby jointly and severally appeal from the said interlocutory order or decree, to the Supreme Court of the United States,

[*Erased in copy.]

for the reasons set forth in the assignment of errors filed herewith; and said defendants jointly and severally pray that their
297 appeal be allowed from the said interlocutory order or decree to the Supreme Court of the United States, and that a citation be issued as provided by law, and that a transcript of the records, proceedings and documents upon which said interlocutory order or decree was based, and of the opinion rendered herein, duly authenticated, be sent to the United States Supreme Court under the Rules of said court in such cases made and provided, and that the said interlocutory order or decree of the United States District Court for the Southern District of New York, granting a preliminary injunction herein, may be reversed and such order made as to the said Supreme Court of the United States may seem meet and just.

And your petitioners further pray that a proper order be made dispensing with security to perfect their appeal as aforesaid.

Dated, Albany, N. Y., June 29, 1922.

WILLIAM A. PRENDERGAST,
Chairman Public Service Commission, Defendant-Appellant.

LEDYARD P. HALE,
Solicitor for Public Service Commission and William A. Prendergast and Others, Members Thereof, and Counsel Thereto, Appellants.

CHARLES D. NEWTON,
Attorney General, Appellant.

WILBER W. CHAMBERS,
Solicitor for Defendant Newton.

SIMON FLEISCHMANN,
Counsel for Public Service Commission, Appellants.

298 STATE OF NEW YORK,
County of Albany, ss:

Wiiiiam A. Prendergast, being duly sworn, says:

I am Chairman of the Public Service Commission of the State of New York and one of the defendants-appellants above named. I have read the foregoing petition and the same is true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

WILLIAM A. PRENDERGAST.

Sworn to before me this 29th day of June, 1922.

B. H. BAKER,
Notary Public in and for Albany County, N. Y.

Appeal herein allowed and bond to cover costs of appeal is hereby dispensed with.

Dated, New York, June 20, 1922.

(Sd.) J. M. MAYER,
U. S. C. J., Duly Designated.

Endorsed: U. S. District Court, S. D. of N. Y., Filed June 30, 1922.

299 District Court of the United States, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff-Appellee,

against

WILLIAM A. PRENDERGAST, WILLIAM R. POOLEY, CHARLES VAN Voorhis, Oliver C. Semple, Charles G. Blakeslee, the Persons Constituting the Public Service Commission of the State of New York; Ledyard P. Hale, Counsel to said Public Service Commission of the State of New York, and Charles D. Newton, Attorney-General of the State of New York, Defendants-Appellants.

Assignment of Errors.

Now come the above named defendants-appellants, William A. Prendergast, William R. Pooley, Charles Van Voorhis, Oliver C. Semple and Charles G. Blakeslee, the persons constituting the Public Service Commission of the State of New York, and Ledyard P. Hale, their counsel, and Charles D. Newton, Attorney General, and in connection with their petition for appeal in the above entitled action, file the following assignment of errors upon which they will rely in their prosecution of the appeal in said cause, from the interlocutory order or decree of this court entered in said cause on the 13th day of June, 1922, awarding to the plaintiff a preliminary injunction herein as prayed for by the plaintiff in its bill of complaint, and say that in the record, proceedings and in the said interlocutory order or decree aforesaid, manifest error has intervened, to the prejudice of the appellants, to wit:

300 1. The court erred in not holding that the bill of complaint does not state facts sufficient to constitute a cause of action, and in not refusing the injunction, and in not dismissing the suit and bill of complaint.

2. The court erred in granting a preliminary injunction, decreeing that defendants be enjoined pending the determination of this cause, from attempting to compel plaintiff to enforce the rates for telephone service prescribed by said two orders of March 3, 1922, of

said Public Service Commission of New York, and from taking any proceedings against plaintiff, to enforce any penalties or any other remedies for disregarding the rates prescribed by said orders.

3. The court erred in holding that the said two orders are void or deprive plaintiff of its property without due process of law or deny to plaintiff the equal protection of the laws in violation of the Constitution of the Fourteenth amendment thereto.

4. The court erred in holding that the District Court of the United States for the Southern District of New York has jurisdiction as a Federal Court of the subject matter of said action.

5. The court erred in not refusing the injunction order in view of the fact that the plaintiff had, and has a plain, adequate and complete remedy at law, by asking for a rehearing before the Public Service Commission of the State of New York, under section 22 of the Public Service Commission Law, or by appropriate actions or proceedings in the Courts of the State of New York, by reason whereof this suit in equity was prohibited and cannot be sustained, under section 267 of the Judicial Code.

6. The court erred in holding that the United States Dis-
301 trict Court had jurisdiction of this action, in view of the fact that the plaintiff has not availed itself of, or exhausted the remedies given to it by the Public Service Commission Law of the State of New York, both by and before said Commission and the courts of the State of New York.

7. The court erred in holding that the United States District Court had jurisdiction to restrain the enforcement of said orders of March 3, 1922, in view of the fact that the said Public Service Commission had taken no steps, either in the courts of the State of New York, or otherwise, to enforce the same.

8. The court erred in holding that plaintiff was entitled to institute this suit, and to an injunction therein, without alleging, or it being the fact, that plaintiff had, before bringing this suit, applied to the Public Service Commission for a rehearing upon the said two orders of March 3, 1922, and the rates thereby prescribed, as it was permitted and required to do by section 22 of the Public Service Commission Law of the State of New York.

9. The court erred in holding that it had power or authority to review or restrain the enforcement of the rates prescribed by said two orders of March 3, 1922, in view of the fact that said rates were only temporary rates, to be enforced during the pendency of the proceeding pending before said Public Service Commission, as distinguished from permanent rates which had not, and have not been fixed or determined upon by said Commission, said proceeding not being completed.

10. The court erred in determining that it had power or was warranted in passing upon the reasonableness or unreasonableness of the rates prescribed by said two orders of March 3, 1922, and to en

join their enforcement in the absence of, and without having
302 before it, the proceedings had and the evidence taken by said Public Service Commission, and the record thereof, prior to and up to the time of instituting this suit, and upon which the said two orders of March 3, 1922, and the rates thereby prescribed were based.

11. The court erred in not refusing the injunction on the merits, as disclosed by the facts and the bill of complaint, answer, affidavits and other papers before it, and the granting of said injunction constituted an abuse of discretion.

12. The court erred in holding that the rates prescribed in said two orders of March 3, 1922, said orders are confiscatory of plaintiff's property.

13. The court erred in determining the amount or fair rate of return which the plaintiff would realize upon its property and business, conducted upon the basis of the rates fixed by said two orders.

14. The court erred in holding that the effect of said orders is to decrease the income of plaintiff from business done within the State of New York, below the fair rate of return upon its property.

15. The court erred in holding that at the beginning of 1922, the cost of plaintiff's property was in excess of $240,000,000 and such cost is to be taken as a basis for estimating the reasonableness of the rates fixed by, or fair rate of return upon plaintiff's property.

16. The court erred in fixing at too large an amount, the value of the property of the plaintiff upon which the court determined the rate or amount of income upon which the plaintiff was entitled to receive a fair return, and also in fixing at too large an amount, the expenses chargeable against the gross revenue derived by plaintiff from its property.

303 17. The court erred in holding that the amounts which plaintiff charged and claims should be charged to expenses, or charged against gross revenue for depreciation is not materially in excess of a fair and reasonable sum sufficient to provide for depreciation and for renewals and replacements of its property and equipment.

18. The court erred in holding that plaintiff is entitled to be allowed, as a part of its operating expenses, to be deducted in determining the fair return or income on its property and business, the sum claimed to be paid by it as license fees or otherwise, to The American Telephone & Telegraph Company.

19. The court erred in holding that plaintiff is entitled to be allowed, as a part of its operating expenses to be deducted in determining the fair return or income on its property and business, any sums as so-called income tax paid by plaintiff to the United States.

20. The court erred in not taking into account, in determining the reasonableness or unreasonableness of the rates prescribed by the two orders of March 3, 1922, the amount of income received by plaintiff from its interstate business.

21. The court erred in holding that there is no difference between a temporary and a permanent rate established by the said Public Service Commission, or in the relationship and jurisdiction of the courts in regard thereto.

22. The court erred in not denying plaintiff's application for an interlocutory injunction, for the reason that, in undertaking
304 to determine the value of property of plaintiff upon which a fair return was to be computed by the court, the court considered and gave weight to the fixed capital of the company as shown upon its books, without first deducting therefrom, the reserve which the company had itself accumulated as representing the depreciation which then and there existed in such fixed capital.

23. The court erred in not denying plaintiff's application for an interlocutory injunction, in view of the fact that the rate fixed by the Public Service Commission had not received a fair test in actual use or for a reasonable period of time.

Wherefore, the appellants pray that the said interlocutory order or decree of injunction be reversed and that said District Court for the Southern District of New York be directed to enter an order or decree reversing said decision and order and decree of the lower court in this suit.

Dated, Albany, N. Y., June 29, 1922.

LEDYARD P. HALE,
Solicitor for Public Service Commission and William A. Prendergast and Others, Members Thereof and Counsel Thereto, Appellants.

CHARLES D. NEWTON,
Attorney-General.

WILBER W. CHAMBERS,
Solicitor for Defendant Newton, as Attorney-General, Appellant.

SIMON FLEISCHMANN,
Counsel for Public Service Commission, Appellants.

Buffalo, N. Y.

Endorsed: U. S. District Court, S. D. of N. Y. Filed June 30, 1922.

305 Original.

District Court of the United States, Southern District of New York.

E 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Complainant

against

WILLIAM A. PRENDERGAST et al., Constituting the Public Service Commission, and Charles D. Newton, as Attorney General of the State of New York, Defendants; The City of New York, Appellant.

Citation.

U. S. District Court, S. D. of N. Y. Filed Jul. 12, 1922.

John P. O'Brien, Corporation Counsel, Solicitor for Appellant, The City of New York, Municipal Building, New York City.
Copy received Jul. 12, 1922.
STETSON, JENNINGS & RUSSELL,
Solicitors for N. Y. Telephone Co.

Received copy July 12, 1922.
LEDYARD P. HALE,
Counsel to Public Service Commission.

Copy of within paper received Jul. 12, 1922.
CHARLES D. NEWTON,
Attorney General.

306 By the Honorable John C. Knox, one of the Judges of the District Court of the United States for the Southern District of New York to the New York Telephone Company, Greetings:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden in the City of Washington, D. C., in the District of Columbia, on the 5th day of August, 1922 pursuant to an appeal filed in the Clerk's office of the United States District Court for the Southern District of New York, wherein The City of New York is the appellant in a suit in equity, and you are respondent to show cause, if any there be, why the decree herein entered on the 8th day of April, 1922, in the United States District Court, for the Southern District of New York, should not be corrected and reversed and why speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in The City of New York, in the District above named, this 7 day of July, in the

year of Our Lord, one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-seventh.

JNO. C. KNOX,
Judge of the District Court of the United States, Southern District of New York.

307 *Affidavit of Service on Attorney of Printed Papers.*

CITY, COUNTY AND STATE OF NEW YORK, *ss:*

James Bailey being duly sworn, says, that on the 12 day of July 1922 at No. 15 Dey St. in the Borough of Manhattan in The City of New York, he served 1 copy of the annexed Citation upon Charles T. Russell Esq. the attorney for the Plaintiff in the within entitled action by delivering 1 copy of the same to a person in charge of said attorney's office, and leaving the same with him.

JAMES BAILEY.

Sworn to before me, this 12 day of July, 1922.

CHARLES E. LALANNE,
Notary Public, New York Co., No. 16.

New York County Register No. 4007.
Term Expires March 30, 1924.

308 United States District Court, Southern District of New York.

In Equity.

No. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

against

WILLIAM A. PRENDERGAST et al., Defendants.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

Dated, New York, July 19th, 1922.

CHAS. T. RUSSELL,
CHARLES T. RUSSELL,
STETSON, JENNINGS & RUSSELL,
Solicitors for Plaintiff.

CHARLES D. NEWTON,
CHARLES D. NEWTON,
Attorney-General of the State of New York.

WILBER W. CHAMBERS,
WILBER W. CHAMBERS,
Solicitor for Defendant Charles D. Newton, Attorney-General.

LEDYARD P. HALE,
By W. W. C.,
LEDYARD P. HALE,
Solicitor for Defendant- Public Service Commission of the State of New York and William A. Prendergast et al., Members Thereof, and Hale as Counsel for Public Service Commission.

309 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Equity. 23-252.

NEW YORK TELEPHONE COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM A. PRENDERGAST et al., Constituting the Public Service Commission of the State of New York, and Others, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record

of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 4th day of August, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of the District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

310 [Endorsed:] United States District Court, Southern District of New York. New York Telephone Company, a Corporation, Plaintiff, against William A. Prendergast et al., Defendants. (Copy.) Transcript of Record on Appeal.

Endorsed on cover: File No. 29,092. S. New York D. C. U. S. Term No. 542. William A. Prendergast et al., constituting the Public Service Commission of the State of New York, et al., appellants, vs. New York Telephone Company. Filed August 10th, 1922. File No. 29,092.

FEB 3 1923
WM. R. STANSBURY
CLERK

Supreme Court of the United States

October Term, A. D. 1922.

No. 542.

WILLIAM A. PRENDERGAST, *et al.*, constituting the Public Service Commission of the State of New York, *et al.*,

Appellants,

against

NEW YORK TELEPHONE COMPANY, a Corporation,

Appellee.

BRIEF ON BEHALF OF APPELLANTS.

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the State of New York.

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Albany, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1922. NO. 542.

WILLIAM A. PRENDERGAST, *et al.*, constituting the Public Service Commission of the State of New York, *et al.*,
Appellants,
against
NEW YORK TELEPHONE COMPANY, a corporation,
Appellee.

BRIEF ON BEHALF OF APPELLANTS.

STATEMENT OF CASE.

This is an appeal from an interlocutory injunction order granted by Judge Charles M. Hough, Circuit Judge, and Judges Augustus N. Hand and John C. Knox, District Judges, sitting in New York City as a special statutory court, pursuant to section 266 of the Judicial Code, on the 12th day of June, 1922, enjoining the appellants, the Public Service Commission and the Attorney General of the State of New York pending the trial and determination of this cause, from attempt-

ing to compel the New York Telephone Company to observe or put into force the temporary rates for telephone service prescribed by two orders made by the Public Service Commission on March 3rd, 1922, and restraining the appellants from taking any steps or proceedings against the New York Telephone Company to enforce any penalties for disregarding the rates prescribed by said orders. (pp. 186, 187).

The appeal comes directly to this court pursuant to section 266 of the Judicial Code.

This suit in equity was begun by the filing of a bill of complaint on the 29th day of March, 1922 (p. 92). An answer was filed by appellants which denied the material allegations of the complaint and set up affirmatively, that the orders in question were orders prescribing only temporary rates and that the Commission had the power to reconsider them upon an application by the company for a rehearing; but no such application was made, and that the Commission, believing that the public interest required a change in the existing rates and rentals charged by the New York Telephone Company, and pending the final determination of the proceeding which was then pending before it, reduced the rates then in force. (One order related to New York City and the other to the entire state—pp. 27, 37, 96-101, 188, 189).

The investigation, on motion of the Commission, as to rates and regulations of the New York

Telephone Company was undertaken by the Commission on or about November 29, 1921.

This investigation had been going on from that time until the making of the orders of March 3rd, 1922, and continued thereafter, and a large amount of evidence had been submitted to the Commission. But at that time, the investigation had not been completed.

And so the orders in question were made, calling for a small temporary reduction of about 5 per cent in the rates then in force to telephone subscribers. (pp. 27-29).

The orders are by their terms temporary in nature and were intended to operate only during the period while the investigation was in progress and until its final determination.

ASSIGNMENTS OF ERROR.

While appellants have formulated numerous specific assignments of error to cover different aspects of the questions presented on this appeal (pp. 191-194) they may be for convenience summarized and grouped as follows:

1. The specially constituted court of three Judges, which granted the interlocutory injunction was not authorized to act in the premises, there being no claim that the Public Service Commission Law is unconstitutional.

2. Appellee had an adequate remedy at law of which it failed to avail itself, given by the Public Service Commission Law in providing for a

prompt rehearing and determination thereon by the Commission upon application therefor, and at the time the two orders fixing temporary rates were made proceedings to fix permanent rates had not reached the judicial stage.

3. An interlocutory injunction should not have been granted as the rates fixed by the two orders provided only temporary rates pending the final determination of the permanent rates in the proceeding pending before the Commission, particularly in the absence of and without the court having before it the evidence which had already been taken by the Commission before said temporary orders were made.

4. The evidence before the court below was insufficient to justify granting an interlocutory injunction as it did not establish that the rates prescribed in the two orders of March 3rd, 1922, were confiscatory and appellee failed to meet the burden of proof on this question.

5. The granting of the interlocutory injunction, under the circumstances of this case, in any event, was not warranted either as matter of law or discretion.

6. The court erroneously determined that the temporary rates fixed by the Commission were unreasonable, in the absence of evidence that the application and collection thereof had received a fair test in actual use or for any reasonable period of time.

THE LAW.

POINT I.

The specially constituted court of three judges had no jurisdiction to grant the interlocutory injunction, as no statute of the State of New York was attacked as unconstitutional.

For the convenience of the court, we quote §266 of the Judicial Code, under which this jurisdictional question arises, and which is as follows:

> "Sec. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the *unconstitutionality of such statute*, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such

application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* that one of such three judges shall be a justice of the Supreme Court, or a circuit judge." (First italics ours).

This acute question of jurisdiction was presented to the United States District Court in the Southern District of Michigan in August, 1922, before a regular term of the District Court, presided over by a single District Judge, in an action like the present, brought by the Michigan State Telephone Company against the Public Utilities Commission of that State, to restrain the enforcement of a new schedule of telephone rates, claimed by the Telephone Company to be confiscatory. The Telephone Company there moved for an interlocutory injunction, making its motion before a single District Judge. The jurisdictional question presented, was whether under Section 266 of the Judicial Code, an interlocutory injunction could be issued by less than three Judges called for by said section in cases in which only *a rate* was attacked as confiscatory, no question being raised as to the constitutionality of the statute under which it was fixed.

It was held by the District Court that as no statute was challenged on the ground of unconstitutionality, the Public Utilities Commission Law, being concededly constitutional, no case was presented falling within Section 266,

and that, therefore, an interlocutory injunction to restrain the enforcement of rates claimed to be confiscatory and promulgated under a statute concededly constitutional, was properly brought in the usually constituted District Court presided over by one Judge, and that an especially constituted court of three Judges was not authorized.

Michigan State Tel. Co. v. Odell, et al., 283 Fed. 139.

We also respectfully urge that the converse of the conclusion reached by Judge Tuttle will have to be held sound, viz: that if the District Court, as primarily constituted, retains this jurisdiction, and it was not intended to be conferred upon a specially constituted statutory court of three Judges, it cannot be conferred upon such latter tribunal by implication or by the suggestion that as such triune court might include a District Judge no harm came to public officials affected by an injunction issued under such circumstances.

Many answers to such a contention suggest themselves. Under Section 266, such a specially constituted statutory court is not required to embrace in its composition any District Judge whatsoever; and even if there should happen to be a District Judge sitting with others, he might conclude to deny an injunction and his associates overrule him or *vice versa*. Both defendant and plaintiff in such a situation have the absolute right, if the construction of the statute formulated by Judge Tuttle is correct, to have the question of

the granting or refusal of an injunction passed upon by a single District Judge.

> "This is a question of statutory power and jurisdiction—not one of judicial discretion or equitable consideration."
>
> *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Comm.* decided Nov. 20, 1922; Supreme Court Adv. Opinions, #4, Dec. 15, 1922, 67 L. Ed. p. 96.

We invite the attention of this court to the reasoning by Judge Tuttle in reaching the conclusion he did which, if sustained by this court, will dispose of the present appeal at its threshold and require a reversal of the interlocutory injunction order granted by a court having no power or jurisdiction in the matter.

POINT II.

The complaint does not state facts, as distinguished from conclusions of fact and of law, constituting a cause of action, or, in any event, affording foundation for an interlocutory injunction.

Having in mind the well settled rule that the burden was at all times on the appellee to establish facts which if capable of proof and not met, would entitle it to an interlocutory injunction, we submit that the allegations of the complaint which

must necessarily form the foundation not only for the suit but for the interlocutory injunction order were vitally defective, as a brief analysis will show.

The general allegations in the complaint as well as in the moving affidavits as to the property of appellee in the alternative, to the effect that it is "used or useful in furnishing said telephone service," and without indicating what part or percentage of the property falls under either classification, are obviously evasive and of no value to the court, in determining the question before it, especially, in view of the fact that the Public Service Commission Law of New York specifically allows (§97 [1]) "a reasonable average return upon the value of the property *actually used* in the public service", which, we believe, formulates the law as established by the courts. (See paragraph III, fol. 9, paragraph VII, fol. 13, paragraph IX, fol. 14, paragraph XI, fol. 15.)

The complaint alleges, that, while the statements as to the cost of appellee's property include nothing for franchises or going concern value, the latter item has been considered in determining the present cost of reproduction and the reasonable value, but it fails to state to what extent. How was the court able to determine by this and other evasive allegations, what would be a reasonable return either on the value or the reproduction cost of the property of appellee? The Commission on a full hearing may well and justifiably disagree with the appellee on the amount properly allow-

able for the elastic item of "going concern value". (Paragraph VII, fol. 13.)

The appellee, instead of giving the facts or figures from which the court might have deduced the proper rate per cent of annual return upon the cost of the property of the appellee, saw fit to absorb the figures and the accuracy that would have resulted from their presentation, by contenting itself with giving the varying rates per cent from 1919 to 1922 upon a basis obviously involving important and undisclosed elements, pleading only the percentages resulting from its own mental operations and private methods of accounting, on this vital point. So, while it is here alleged that the fair and reasonable value of its property is "an amount substantially in excess of its cost" no figures are given in the complaint to substantiate this allegation nor to admit of its analysis. (Paragraph VIII, fol. 13).

The allegation that the net revenues from intrastate business were less than 8% of the cost of the property by stated amount again involves numerous undisclosed elements upon which the appellee bases this claim and which the court below was powerless to substantiate or analyze in the absence of the figures leading to appellee's conclusion. (Paragraph X, fol. 14.)

The same criticism applies to the general conclusions, later on, that appellee, with reasonable economies and efficient service, will be prevented from earning more than certain stated percentages upon the cost or value of said property in

the State of New York, constituting conclusions of law or fact the basis for which is undisclosed. Possibly the court might be disposed to allow a certain latitude in a complaint upon which provisional remedy is asked and upon which a complainant could proceed to trial. But obviously the sufficiency of a complaint, when made the basis for an interlocutory injunction tying the hands of an agency of a sovereign state, presents a very different question, as has been recognized by this court, as well as other courts, and is based upon the rule that a complainant must make out a clear case on the facts to entitle him to the extraordinary preliminary remedy of injunction before trial.

This consideration has added force in the instant case, where the appellee itself pleads, that, even by its own method of computation, based on undisclosed facts, the corpus of its property will not be touched or impaired by the temporary rates, but merely its profits temporarily reduced; as it admits and pleads, in its own complaint that, if the temporary rates are allowed to remain in force "plaintiff will be prevented from earning any return in excess of 2.56% per annum upon the cost of its said telephone property in the State of New York and from earning any return in excess of 1.96% per annum upon the fair and reasonable value of said property." (Paragraph XI, fol. 15.)

The complainant must not only show, fairly and clearly, the value of the property employed in

furnishing service, but also the amount of its gross earnings and what it did with them; and this should be clearly and conclusively shown to justify the court in interfering with a legislative act fixing the rate. The court should be fully advised as to what is done with the receipts and earnings of the company, for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure a proper return.

II Wyman on Public Service Corps., Sec. 1152.
Chicago & G. T. R. Co. vs. Wellman, 143 U. S., 339.
Tucker vs. Mo. P. R. Co., 82 Kans., 222.

He who would strike down a law, a statute, or the order of an administrative body, having the force of a statute, must show that the alleged unconstitutionality of it, injures him and operates to deprive him of rights, protected by the Federal Constitution, and the complaint or bill must contain a statement of the *facts*, so that the court may determine by the pleading that the plaintiff's constitutional rights have been violated.

Plymouth Coal Co. vs. Pennsylvania, 232 U. S. 531, 545.
Southern R. Co. vs. King, 217 U. S. 524.
Standard Stock Food Co. vs. Wright, 225 U. S. 540, 550.

Rosenthal vs. New York, 226 U. S. 260, 271.

This court has very recently reinforced these principles in dismissing a bill on appeal regarded as sufficient by the court below upon the ground that it failed to set forth "specific facts * * * sustaining this mere legal conclusion." *(Bailey v. George* [May 15, 1922] .U. S. .)

In Chancery the rule was that facts not founded on allegations in the bill must not be introduced into the affidavits, and that the affidavits are to be considered only as evidence of the allegations made in the bill and cannot be attended to as laying a foundation for equities not otherwise claimed.

Stull vs. Westfall, 25 Hun, 1.

Kerr on Injunctions, (1871) p. p. 613, §23.

De Lacey vs. Adams, 52 N. Y. State Rep. 509.

1 *Joyce on Injunctions*, (2nd Ed.) §133, pp. 237, 238.

A temporary injunction is unauthorized when it does not appear from the complaint that plaintiff is entitled to the final relief for which the action is brought. Where an injunction is the final relief sought, the facts entitling the plaintiff to it must be averred in the complaint.

McHenry vs. Jewett, 90 N. Y. 58.

Not only is there no allegation in the complaint, or in the affidavits, that the Commission would

unreasonably have delayed a decision on an application for a rehearing on the *temporary* rates, and which, under the statute, it was obliged to hand down within thirty days after submission, but there is no allegation thaf the Commission would delay the hearing or determination of the question of the *permanent* rates to be fixed, as the result of the investigation then pending before it.

This material omission, as well as the entire absence of any charge of bad faith on the part of the Commission, was considered a controlling factor in denying an injunction against the Railroad Commission in *Wisconsin-Minnesota Light & P. Co. vs. Railroad Com'n*, 267 Fed. 711, the court using the following language, peculiarly applicable to the situation in the instant case, said:

> "* * * as it is not claimed in the case before us, that the delay in determining fully the pending petition before the Commission is unreasonable, or that the conduct of the Commission has been arbitrary or capricious, the authority of such cases, (cited by the court), is controlling, with respect to equitable interference pending legislative or administrative procedure by a duly constituted tribunal." (p. 719).

The Public Service Commission, having the power to fix rates, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action.

Brown vs. Hitchcock, 173 U. S. 473, 477.
Kirkan vs. Murphy, 189 U. S. 35, 54.

POINT III.

By the Public Service Commission Law, appellee, under the circumstances of this case, was obliged to exhaust its remedies, which included an application for a rehearing upon the temporary rate, and of which right it did not see fit to avail itself, before it could resort to a court of equity for injunctive relief.

The orders made by the Commission, the enforcement of which is enjoined by the preliminary injunction, were issued by the Commission on March 3, 1922, and fix temporary rates for cities, towns and villages of the State. (pp. 29-38). The orders were not to take effect until April 1st, 1922. (p. 29). The orders themselves provided that the company

> "may apply to the commission for a modification of the classifications hereinbefore made, by filing application, in writing, stating the reasons therefor at the office of the commission in Albany, New York, on or before April 15th, 1922." (p. 38).

The portions of the statute constituting the Public Service Commission Law applicable to the consideration of this point are as follows:

> "Sec. 97. * * * If it shall be made to appear to the satisfaction of the Commission that the public interest requires a change in the rate, charge or rental for telephone or telegraph service charged by any such person or

corporation, or that such change is necessary for the purpose of providing adequate or sufficient service or for the preservation of the property, the Commission may, upon such terms, conditions or safeguards, as it deems proper, authorize an immediate, reasonable, temporary increase or decrease in such rate, charge or rental, pending a final determination of the rate, charge or rental to be thereafter demanded, exacted or collected by such person or corporation. * * * *."

Sec. 22. After an order has been made by a commission, any corporation or person interested therein shall have the right to apply for rehearing in respect to any matter determined therein, and the Commission shall grant and hold such a rehearing if in its judgment sufficient reason therefor be made to appear; if a rehearing shall be granted, the same shall be determined by the Commission within thirty days after the same shall be finally submitted. An application for such a rehearing shall not excuse any corporation or person from complying with, or obeying any order or any requirement of any order of the commission, or operate in any manner to stay or postpone the enforcement thereof, except as the Commission may by order direct. If, after such rehearing, and a consideration of the facts, including those arising since the making of the order, the Commission shall be of opinion that the original order or any part thereof is in any respect unjust or unwarranted or should be changed, the Commission may abrogate or change the same. An order made after any such rehearing, abrogating or changing the original order, shall have the same force and effect as an original order, but shall not affect any right or the enforce-

ment of any right arising from or by virtue of the original order."

It will be observed that under the above provisions, the Commission, on the one hand, was given power, in the public interest, or for the protection of a telephone or telegraph Company, to make an immediate, reasonable, *temporary* increase or decrease in existing rates, pending a final determination of the rate.

On the other hand, the company or interest deeming itself adversely affected by such temporary rate, can at once apply for a rehearing and obtain a determination thereon by the Commission within thirty days after its final submission.

There is no allegation in the complaint that appellee ever made any application for a rehearing, either under the statute above quoted, or under the express reservation of the orders, and this fact stands undisputed, and we submit this, of itself, constitutes a fatal jurisdictional defect. This jurisdictional defect was set up affirmatively by the appellants in the answer, and appears from the affidavits (pp. 99-100).

Section 267 of the Judicial Code immediately following section 266 under which the present appeal is taken, provides as follows:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law."

See also

Singer Co. vs. Benedict, 229 U. S. 481.

We contend that in the situation, as it existed at the time the interlocutory injunction was granted, the appellee had such remedy by application for a rehearing to the Public Service Commission; and if it did not obtain the relief to which it claimed itself entitled, then by certiorari in the state courts to review the action of the Public Service Commission.

People *ex rel.*, C. P., etc. R. R. Co. v. Willcox, 194 N. Y. 383,

In any event the appellee was required to exhaust its remedy by such application for a rehearing and correction of the orders if entitled thereto before resorting to the Federal courts.

While we respectfully insist that as a matter of law under the provisions of the Public Service Commission Law and the authorities of this court and other courts applicable thereto, appellants were required to apply for such rehearing before resorting to a court of equity, for injunctive relief, in any event the failure of appellee so to do under the circumstances of this case, and in view of the speedy determination to which appellants would have been entitled under the provisions of the above law made the granting of an interlocutory injunction improper and constituted an unwarranted exercise of discretion in the court below. The shortness of the intervening period within which the Telephone Company could have exhausted its remedies under the statute and the practical impossibility of the temporary rate in force during

this period, being in any fair sense of the term, confiscatory for so short a period, must demonstrate the unreasonableness of the interference at this juncture, by a court of equity in tying up the Commission from further action, and thus relieving the Telephone Company from affirmative action on its part to obtain relief, under the very same statute under which it claims the unjust rate was prescribed.

The situation might possibly be different, if the statute gave the commission an unreasonably long period in which to determine such an application for a rehearing, or there were allegations of bad faith in the complaint against the Commission of anticipated unreasonable delay by the Commission, or something of the kind, none of which appears, is alleged, or can be claimed.

As bearing upon the lack of diligence and good faith on the part of the Telephone Company, in asking for a rehearing, attention is called to the fact that the temporary orders of which complaint is made, were granted March 3rd, 1922, but upon their face contained a provision postponing the date of their becoming operative to April 1, 1922, nearly 30 days thereafter. (p. 28, Fol. 45, p. 29, Fol. 47).

Furthermore, the State wide order, including New York City, contained a further provision that the appellee or any municipality might apply to the Commission for a modification of the classifications made by said orders, by making

application to the Commission on or before April 15, 1922. (p. 38, Fol. 55).

As we have already pointed out, no such application was made, but in the period during which such application could have been made and would have had to be promptly decided, the appellee, on the 29th day of March, 1922, instituted the present suit in the District Court, obtained a temporary restraining order and an interlocutory injunction order in utter disregard of the statutory privileges given it for redress before the Commission and in a sense, of the Commission itself, which the record shows has clearly endeavored at all times to treat the Telephone Company with extreme consideration.

Furthermore, while an application for a rehearing under Section 22 above quoted, would not of itself stay the operation of the orders, power was given by this section to the Commission to grant such stay, pending the hearing of the application for a rehearing, if it saw fit so to do, as the statute, in providing that the application for a rehearing should not of itself operate as such a stay, continue with the words "except as the Commission may by order direct."

No such stay was asked of the Commission, and there is no allegation or reason to suppose that it would have been refused.

In this connection we submit with entire confidence that as it is alleged and admitted in the bill of complaint itself that the temporary rates will yield at least a small profit to the company

during their continuance and the orders fixing these rates can only continue until the final determination of the proceeding by which permanent rates will be established, and there is no allegation of anticipated unreasonable delay or bad faith on the part of the Commission in making its final order, such temporary rates cannot fairly be considered confiscatory in any reasonable construction of this term.

The authorities, as we interpret them, all agree that the reasonableness of a given rate is to be determined by its operation during a reasonable period of time. It cannot be possible that a public service corporation is entitled to a minimum return on its investment every day of the year considered by itself or during any other short period of time, but that the question must always be one of *reasonable average return* for reasonable periods of time. In this view and having in mind the conceded profit yielded under the temporary rates and therefore the impossibility of these rates in impairing the capital or property of the appellee, the finding of confiscation by the lower court under these circumstances and in view of the provisions of the Public Service Commission Law of New York, giving the opportunity for relief, even before the final order to be made in the proceeding, constituted reversible error in any view of the case.

We contend that as matter of law and under the authorities which we are about to cite, the appellee was obliged to complete the various steps af-

forded it by the orders and by the statute; for until then it could in no event definitely ascertain whether the action of the Commission violated the company's constitutional rights. The Federal Court should not have interfered until this appeared.

This principle seems to be well settled. The authorities sustaining the above proposition of law follow:

Palermo Land & Water Co. v. Railroad Commrs. of California, 227 Fed. Rep. 708.

Prentis v. Atlantic Coast Line, 211 U. S. 210.

Wisconsin-Minnesota Light & Power Co. v. Railroad Commission of Wisconsin, 267 Fed. Rep. 711.

In *Palermo Land & Water Co. v. Railroad Commrs. of California, et al., (supra)*, plaintiff filed a bill asking that the Railroad Commission of California be restrained from enforcing an order made by it fixing plaintiff's water rates, on the ground that such rates were confiscatory, and asked for an injunction enjoining the enforcement of the order *pendente lite*.

The defendant moved to dismiss the bill of complaint on the ground that the action was prematurely brought.

Section 66 of the Act provided that after any order or decision by the Commission, any party pecuniarily interested may apply to the Commission for a rehearing in the matter and that "no cause

of action arising out of any order or decision of the Commission shall accrue in any court to any corporation or person unless such corporation or person shall have made before the effective date of such order or decision application to the Commission for a rehearing." No application was made for a rehearing.

The court granted the motion to dismiss and in the opinion written by Judge Van Fleet, said:

> "This is rested, not only upon well-settled principles of equity jurisprudence, but upon the dictates of comity as well; that where a state has provided, as is its right, a complete legislative scheme for the fixing of rates, those rights should not be interfered with, nor the proceedings of the state arrested, until the last legislative step has been taken, and it may definitely be seen whether the act of the state as a finality ignores or infringes upon the rights of the complaining party; that until such time it cannot be said that the state authorities have violated those rights, or refused to observe them, and until that stage is reached it is not within the province of the Federal Courts to interfere. As aptly and tersely put by the Chief Justice in his concurring opinion:
>
> > 'The transaction must be complete, and jurisdiction cannot be rested on hypothesis. A fortiori, this must be so where Federal Courts are asked to interfere with the legislative, executive or judicial acts of a state, unless some exceptional and imperative necessity is shown to exist, which cannot be asserted here. Moreover, this is demanded by comity, and what comity requires is as much re-

quired in Courts of Justice as in anything else. * * * * And as applied to federal interference with state acts, the observance of this rule of comity should be regarded as an obligation. It is recognized as such by Section 720 of the Revised Statute.'

These considerations have application and controlling effect in the present case. It can with no more propriety be said here that the proceedings of the state commission were complete without an opportunity to revise its order on petition for rehearing than that the order of the Virginia Commission was final without the exercise of the revisory power of the Court of Appeals. The right and opportunity to correct any injustice or imperfection in its order before having it assailed is as imperative here as was the right of the Virginia Commission to have its order reviewed by its court of last resort. It is the last legislative step, and without it its action is incomplete." (pp. 709-710).

In *Prentis v. Atlantic Coast Line (supra)*, bills in equity were filed by various railroads to enjoin the Virginia State Corporation Commission from publishing or taking any other steps to enforce a certain order fixing passenger rates upon the ground that the rates were confiscatory. The defendants appeared specially and demurred to the bill on the ground that the proceedings before the Commission were proceedings in a court of the State which the courts of the United States are forbidden to enjoin; that the decision of the Commission made the legality of the rates *res adjudicata*. On the bill and demurrer final de-

crees were entered in favor of the plaintiffs. The defendants appealed to this court.

It appeared that the statute law of Virginia gave to plaintiffs a right to appeal to the Supreme Court of Appeals from the orders in question. This court held that plaintiffs should have taken the appeal allowed to them at the legislative stage (of the ratemaking proceedings) so as to make it absolutely certain that the officials of the State would try to establish and enforce an unconstitutional rule, and that the filing of the bill in the Circuit Court was premature. Mr Justice Holmes, writing for this court, said:

> "The State of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that Commission, but by making its decisions dependent upon the assent of the same historic body that is entrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States.
>
> "If the rate should be affirmed by the Supreme Court of Appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the Circuit Court, without fear of being met by a plea of *res adjudicata*.
>
> * * * * * * * *

"No rate is irrevocably fixed by the State until the matter has been laid before the body having the last word. It may be that that body will adhere to the old rate or will establish one that will not be open to the charge of violating the contracts alleged. The contracts alleged do not prohibit a certain reduction if the profits heretofore realized have exceeded a certain amount. On the question of contract as on that of confiscation it is reasonable and proper that the evidence should be laid, in the first instance, before the body having the last legislative word." (pp. 230-232).

In *Wisconsin-Minnesota Light & Power Co. v. Railroad Commission of Wisconsin, et al. (supra)*, the principle involved is similar to that involved in the instant case. There it appeared that plaintiff filed with the defendant commission its petition asking for an increase of rates covering the entire State. The Commission determined the rate for three communities out of thirty-two. The plaintiff charged that the increase of rates allowed to the three was confiscatory. The court denied the injunction *pendente lite* upon the broad ground that a court of equity ought not to interfere with the system of regulating public utilities, prescribed by the State's statutes.

The court, in the opinion of Geiger, District Judge, observed:

"So that, if in the case before us the court should condemn the existing rates, with or without recognition of the tentative rates tendered by the complainant, it would seem idle

to have the commission function further in the pending proceedings before it, because ultimately it would lead merely to the necessity of a recession by the court or the commission of either of their respective determinations, whether they be final or preliminary.

"If, therefore, it be assumed that the equitable jurisdiction could ultimately prevail, there is none the less established a policy whereunder the system of regulating public utilities may be made nominal only; the real regulation being conducted in equity. We believe that the plaintiff's bill discloses this very infirmity, and, if the jurisdiction were exercised, this result would follow in the particular case before us, and that regulation by the defendant tribunal would amount to nothing, because the proceedings pending before it could at all times be frustrated in the accomplishment of their object through the concurrent exercise of the equitable power, which latter, of course, if not resorted to for the purpose of *dominating* it, ought not to be resorted to at all until *finality* of action by the state can be asserted. (pp. 721, 722).

If we interpret this decision correctly it is that the equitable power of the court ought not to be resorted to until finality of action by the State can be asserted.

Here in the instant case we have only a preliminary or temporary rate. There has been no finality of action on the part of the commission. After the orders were made the commission continued its investigation, and it is fair to assume that it will promptly arrive at a permanent rate which is fair and just to the company. No other pre-

sumption may be indulged in and we submit the courts should wait until the commission had fixed a permanent rate.

We have already called attention to the fact that the orders of the commission provide for a rehearing, that the statute itself expressly provides for a rehearing and besides that the company was entitled as a matter of right to review the orders of the commission in the Supreme Court of New York by certiorari. Such being the case the company may not, or at least should not be permitted to invoke the equitable power of the Federal Courts until it has exhausted its legal remedies before the commission and the state courts.

The temporary rates themselves were fixed by the commission after much testimony had been taken. The company had complete and adequate remedies without recourse to equity—first, by application for a rehearing before the commission, and second, by a review of the order of the commission by certiorari. The authorities which we have cited above we submit are controlling and considerations of comity and the orderly administration of the law require that relief in the Federal Court be denied until the company had exhausted the remedies allowed by the statute and the laws and practise of the State of New York.

Bacon v. Rutland R. R. Co., 232 U. S. 134, relied on by appellee in no way militates against our contention.

In that case the enforcement of an order was enjoined by the Federal Court. The commission

claimed that the railroad company should have taken an appeal to the Supreme Court of the State before resorting to the Federal Court and was overruled in this contention. It appears, however, that the order of the commission was a *final one* and there was evidently no provision in the Vermont law permitting an application for a rehearing, and the only remedy given was by appeal from the order to the Supreme Court of the State which court had no legislative powers. This case, we believe, recognizes that the remedies of which an aggrieved party can avail itself before the commission, which has legislative power, must be exhausted, as they were in that case, before resort can be had to the Federal Courts.

This principle, we believe, is further recognized in the later case of *Detroit Mackinac Railway Co. v. Michigan R. R. Commrs.*, 235 U. S. 402, where it was held that a railroad company which had carried a case originating with the Public Service Commission to the Supreme Court of Michigan, was bound by an adverse decision of that court as to the reasonableness of the rates fixed for it by the commission.

So, in the still more recent case of *Oklahoma Operating Co. v. Love*, 252 U. S. 331, the Federal jurisdiction to restrain the order of the State Commission was sustained, upon the ground that under the constitution and laws of Oklahoma such order was not reviewable by any appeal or other proceeding in the State court, and that the only recourse for securing a judicial test of the

rates in the State Courts, was disobedience of the order and the risk of penalties and punishment therefor. Under these circumstances the jurisdiction of the Federal Courts was sustained. It is clearly implied that if there had been any available remedy under the State laws, the Federal court would not have interfered until those remedies were exhausted.

Again, the necessity of having preliminary resort to a Commission in rate cases and by inference of exhausting the remedies before such Commission is recognized in the recent case of *Great Northern Ry. Co. v. Merchants Co.*,—U. S.—, May 29, 1922. 66 L. Ed. Advance Sheets No. 16—

In the very recent case of the *Cumberland Tel. Co. v. Louisiana P. S. C.*, 283 Fed. Rep. 215, an interlocutory injunction against the Commission was denied upon various grounds, including the following:

> "In considering this application, weight should be given to the fact that the Commission has not issued its final order. It had set an early date for a final hearing before application for injunction was made." (p. 217).

This is substantially the situation in the instant case.

The Court further said:

> "The rates fixed by the Commission are presumed to be just and reasonable. The burden is upon the plaintiff to show that they are unjust, unreasonable or confiscatory. *Railroad Commission of Louisiana v. Cumberland Tel. & Teleg. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577. If it be assumed that

the same rates were unreasonably low in 1920, it does not follow that they would be so at this time. There has been a recession of prices, and current rates upon invested capital are lower now than they were in 1920, and of these facts we may take judicial notice. *Galveston Elec. Co. v. City of Galveston*, 257 U. S. , 42 Sup. Ct. 351, 66 L. Ed. decided April 10, 1922. Under these circumstances, we do not think the fact that the Commission granted an order in February, 1921, increasing rates, is sufficient to take away the presumption of reasonableness from the order of May 13, 1922, suspending the increased rates, and re-establishing the old rates *pending final decision*. The rates complained of have not been subjected to a practical test, and shown to be unremunerative under present conditions." (pp. 217, 218).

Assuming that the immediate intervention of the Federal Courts may be warranted in a proper case after the establishment of permanent rates as the result of a completed investigation which will be found to have been the situation in all of the cases decided by the Federal Courts sustaining such intervention, the situation in the instant case is radically different. This grows out of the provision of the New York State Law which we have found in no other Public Service Commission Law nor in the Interstate Commerce Law, giving power to the Commission during the pendency of a proceeding pending for the determination of permanent rates, to establish temporary rates until such final determination shall be reached. Such temporary rates are, therefore, incidental to the entire proceeding, and

unless they are shown to be clearly confiscatory within a reasonable interpretation of that term and during the temporary period in which they can alone remain operative, the presumption of their having been made in good faith is not to be overcome by anything less than a complete and convincing statement of facts to be furnished by the corporation questioning their reasonableness.

POINT IV.

The Federal Court was not warranted in enjoining the temporary rates in the absence of the evidence which had been taken by the Public Service Commission in the pending proceeding prior to making the temporary orders.

The record shows that the proceedings in which the temporary orders were granted began in November, 1921, and that much testimony had been taken for sometime prior to the making of these orders. (pp. 103, 104, 105, 113, 122).

It also appears that none of this testimony was placed before the lower court to enable it to determine whether the evidence which had been taken before the Commission did not fully warrant the making of the temporary rates.

As the burden of proof rested upon the appellee to satisfy the court of the unreasonableness of these temporary rates, it is difficult to perceive how this obligation was met by the appellee, when

it failed to place before the court, all of the facts and circumstances which would necessarily have been disclosed by a transcript of the evidence taken, and which, under the circumstances, it is not unfair to assume the appellee regarded as unfavorable to its contentions in the court below.

Indeed, the memorandum handed down by the Commission in connection with the making of these orders by which the temporary rates were established states at its very inception (p. 122):

> "The evidence already submitted in this case has been carefully considered, and it appears to the satisfaction of the Commission that public interest requires certain reductions and re-adjustments in the rate schedules of the New York Telephone Company, and that these reductions are reasonable as immediate temporary decreases pending the final determination of this proceeding."

Upon what theory of fairness or equity can the appellee claim, that the temporary rates established were not reasonable, when it failed to bring to the attention of the tribunal, which it asked to enjoin the enforcement of these rates, the evidence upon which the Commission states that it based and determined these temporary rates, but prefers to rely largely upon the opinions of expert witnesses formulated in affidavits and who cannot even be cross examined in court.

The affidavit of Chairman Prendergast of the Commission shows, and is undisputed, that one of the orders fixing temporary rates was not made until after 2600 pages of testi-

money had been taken and the other, until 2180 pages were taken. It further appears that the direct testimony of the appellee in the New York City case had been taken by the Commission before it made its temporary orders and that at the time its orders were made the City of New York was developing its side of the case and rebutting the direct evidence of the company. So that the Commission when it made the temporary orders had before it substantially all of the evidence on the part of the Telephone Company as to the rates in New York City, and much of the testimony relating to up-state rates. (pp. 103, 104).

If the Telephone Company deemed this evidence, introduced on its own behalf when subjected to cross-examination, as it was before the Commission, sufficient to entitle it to restrain the enforcement of the orders fixing the temporary rates, why did it not present it to the court instead of new *ex parte* affidavits?

We submit, that, in any event, the lower court should have required the production before it, of the testimony that had been taken before the Commission and which formed the basis of the temporary rates established in the orders made by the Commission, so that it could have determined whether the Commission acted reasonably or unreasonably, under the facts before it but not before the court.

Nor will it do to say that the Commission rather than the Telephone Co. should have presented to the U. S. District Court the testimony already

taken before it, prior to making the orders fixing the temporary rates, for the simple reason, among others, that the burden of making out a clear and frank case of confiscation was upon the Telephone Company, and, until this burden was met, the Public Service Commission, a great administrative and *quasi* judicial agency of a sovereign state, was not, and should not be called upon to anticipate a charge of having fixed confiscatory and unconstitutional rates of compensation for services rendered by a great public service corporation. These considerations, again, are peculiarly applicable in the instant case, where the rates complained of were only temporary, and concededly allowed a percentage of profit while in force, after allowing every claim connected therewith, advanced by the Telephone Co.

The District Court did not have before it sufficient or satisfactory evidence of facts, which reasonably warranted the inference that the temporary rates, fixed by the Commission, were confiscatory, whereas, obviously, both the District Court and this court would have before it adequate facts and data for intelligent action in an injunctive suit or on an appeal from a decree therein, based upon the entire record and evidence before the Commission, after a permanent rate had been established, which the Federal Courts were asked to review and declare confiscatory. This is especially true, where the rates, as the present ones, are, at most, temporary, and where it is conceded that, during their operation, the

company will still be making a profit, moderate though it be, after resolving every doubtful claim and element in its favor.

The Public Service Commission, having the power to fix rates, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action.

Brown vs. Hitchcock, 173 U. S. 473, 477.
Kirwan vs. Murphy, 189 U. S. 35, 54.

Allegation of irreparable injury, unsupported by facts, insufficient to warrant relief by injunction.

Brass vs. Rathbone, 153 N. Y. 435.

To authorize the granting of an injunction, the facts entitling the complainant to such relief must be clearly and positively alleged in the bill, and affidavits filed in its support cannot supply the omission. The sole function of the affidavits is to support the equities claimed in the bill, and not as averments of equities. The equities must be clearly shown in the bill of complaint, and not left to inference.

U. S. vs. Marine Eng. Ben. Ass'n, 277 Fed. 830, and cases cited, p. 834.
1 *Joyce on Injunctions*, §§ 21 and 109.
1 *High on Injunctions*, §34.

POINT V.

The preliminary injunction was granted upon insufficient and unsatisfactory proof and the appellee failed to present a clear and convincing case or to meet the burden of proof resting upon it.

Should this court come to a consideration of the legal or equitable propriety of determining this appeal upon the merits, as distinguished from jurisdictional and procedural questions elsewhere considered, we respectfully submit that the undisputed facts and reasonable inferences to be drawn therefrom, disclosed by the record call for a reversal of the order appealed from.

It was clearly the intention of Congress in enacting Section 266 of the Judicial Code and permitting a direct appeal to the Supreme Court from the District Court in the exceptional case of the granting or refusing of an interlocutory injunction, restraining the enforcement of a statute or of an order made by an administrative state board, promptly to bring the entire case and situation before the Supreme Court for thorough reconsideration and redetermination.

The purpose of this enactment was to recognize the presumption of correctness and good faith on the part of state commissions in their administrative and quasi-judicial determinations and to sanction preliminary interference therewith by the Federal Courts only in the clearest cases of a showing to the contrary.

The policy of this statute as contended for by us is not only apparent upon its face, but is readily to be inferred from various of its provisions, such as the direction for the hearing of such an application in the first instance by three judges; the provision that the hearing upon such application shall be given precedence and in every way ex-

pedited and assigned for hearing at the earliest practicable day, and the absolute right given to appeal directly to this court from the intermediate order made, whether it granted or refused an interlocutory judgment.

In considering the facts disclosed by the record, the general principle repeatedly enunciated by this court is to be had in mind, to the effect, formulated in a comparatively recent rate case in the following words:

> "'* * * no injunction ought to be granted unless the case is reasonably free from doubt. We think such a rule is and will be followed by all the judges of the Federal Courts.'" (p. 16).
>
> *Knoxville vs. Knoxville Water Co.*, 212 U. S. 1.

So it is settled that "the burden of proof is upon the complainant and is so strong that it must show that the state authorities could not have come to the result which was reached."

> *U. S. vs. Gettysburg Electric Ry. Co.*, 160 U. S. 668, 680.
>
> *Sweet vs. Rechel*, 159 U. S. 380.
>
> *Illinois C. R. Co. vs. Int. Com. Comm.*, 206 U. S. 441.
>
> *San Diego L. & T. Co. vs. National City*, 174 U. S. 739.
>
> *Chicago M. & St. P. R. Co. vs. Tompkins*, 176 U. S. 167, 173.
>
> *San Diego L. & T. Co. vs. Jasper*, 189 U. S. 439, 441.

Applying these principles to the larger and more substantial undisputed elements to be taken as a basis for determining the propriety of the action of the court below in granting the interlocutory injunction, we respectfully and confidently submit that the showing made by appellee was at least so doubtful, uncertain and evasive as to have necessitated the conclusion that appellee had not within a very wide margin met the burden resting upon it to show the unreasonableness and confiscatory character of the rates, even if they had been permanent, and much less, in view of the fact that they are only temporary rates operative until the final determination of the proceeding.

Mr. Maltbie, an expert witness for the Commission, in his affidavit, stated that the cost of all the property used to supply telephone service in New York State, exclusive of working capital, according to *statements prepared by the company* on October 31, 1921, was $218,287,523. He excludes some "other intangible capital amounting to $5,722,932.50" as not representing "property used and useful in the public service," and includes a reasonable allowance for working capital, not exceeding $7,300,000—thus, making the total cost of all plant and property used, not in excess of $225,600,000. (Fol. 221, p. 140).

The depreciation reserves, as of the same date, amounted, according to statements of the Telephone Company, to $68,042,229. Taking out the amount in the depreciation reserve, leaves the cost of the property contributed by the security holders at less than $157,600,000. (Fol. 221, p. 140).

The net income, as stated by the company, for 1921 was $8,462,072. Mr. Maltbie made some readjustments in the anticipated income for 1922—for instance, he increased the revenues, $749,569; reduced the depreciation and amortization allowance $3,000,000; eliminated the Federal income tax, $500,000—and decreased the payment to the parent company by $2,500,000—thus making the total revised net income, $15,211,641. (Fol. 220, p. 139).

This revised net income for the entire State represents 9.6% of the cost of the property used for exchange telephone service, less the balance in the depreciation reserves, and 6.7% of the cost of said property, even without a deduction for depreciation, and if payment to depreciation reserves had been suspended in 1921, because such reserves were excessive, the revised net income in that year would have been $23,320,532, equivalent to 10.3% on the cost of the property, without any deduction for depreciation. (Fols. 221-222, p. 140). He further pointed out that the operating expenses for 1922 would decrease over such expenditures for 1921 in the sum of $2,300,000. (p. 141).

The court below, on the affidavits submitted, concluded that the basis for a return would not be much below $300,000,000; yet Mr. Weber, Chief Accountant of the Commission, in his affidavit (p. 153) states that the actual investment of the company as of October 31, 1921, according to the company's own statement, was only $166,000,000 (p.

153), and that, in addition to that, the company had a depreciation reserve balance of $80,624,-649.76 (p. 154) and a surplus or undivided profits of $36,867,369.64. (p. 153).

This divergence between the amount of investment, and the valuation claimed by the Company, or even that allowed by the Court below, is so extreme, that the reasonable amount upon which a return should be allowed could not be determined from any evidence before the Court below, with sufficient definiteness to warrant the enjoining of the temporary rates fixed by the Commission, and which were, presumably, based upon a fair valuation, there being an absence of that clear and convincing evidence required on the part of the Company having the burden, in this regard, to show a degree of unreasonableness amounting to confiscation.

We have already stated our claim that the revised anticipated net income for 1922 would amount to $15,211,641. The court below found an assumed net income for 1922 of $13,622,800. (p. 185). The income of $15,211,641 would yield a return of approximately 10.81% on the actual investment of $166,000,000 (p. 153), and an income of $13,622,800, a return of approximately 12.10% on the same valuation.

At the time the orders in question were made as appears from the memorandum of the Commission the company's depreciation reserve apportioned to New York State amounted to $69,-596,739; whereas, its total fixed capital in New

York State, including land and intangible items, was $229,427,813, producing a ratio of more than 30 per cent. The Commission considered that the depreciation rates of the company were too high. (p. 122).

It appears in the record and is undisputed, that, during the time the New York Telephone Co. has been in existence (approximately 25 years), it has paid an average annual dividend to its stockholders of 8.17 per cent. (pp. 153-161).

In addition it has accumulated a surplus or undivided profits of $36,867,369.64, of which $21,026,735.65 were accumulated from 1909 to 1921 (pp. 153, 156, Exhs. 15 and 44), whereas the stockholders' actual investment in the company, as of October 31, 1921, was $166,000,000. (pp. 153, 171).

A. D. Welch, an employee of the Telephone Company in his affidavit, claimed that the decrease in revenues, under the temporary rates, prescribed by the orders, throughout the State would amount to not less than $2,900,000, whereas Mr. Maltbie, an expert for the Commission, estimated such reduction at $2,700,000, the difference in their estimates as to this item being inconsequential. But Mr. Maltbie further states that, by reason of the decrease in expenses, the operating expenses for 1922, as compared with 1921, will amount to $3,200,000, leaving a surplus to the Company, growing out of the above figures. (p. 68, Fol. 103, p. 141, Fol. 223).

The above is sufficient, we submit, to warrant the inference, that the temporary rate was not

confiscatory, or that its confiscatory effect was at least extremely doubtful, and that, until the Commission had heard all the evidence, and had found the fair value of the Company's property and the net return thereon, the court below should not have interfered with the rate-making functions of the Commission, especially where they were only temporary.

POINT VI.

The temporary rates fixed by the orders of the Commission had not received a fair test in actual use or for any reasonable period at the time the interlocutory injunction was granted.

We have already pointed out that the temporary rates were provided by the orders of March 3rd, 1922, which by their terms were not to become operative until April 1, 1922, during which period, under the statute, an application for a rehearing could have been made, which period in itself was extended by the orders to April 15, 1922.

Before the temporary rates became operative, at all, the instant suit was instituted, and on March 30, 1922, a temporary restraining order was granted, followed by the interlocutory injunction, in June, restraining the putting into effect of these temporary rates, so that they have never been put into operation nor in any way tested by actual experience to determine what they would yield.

It is conceded that they would return a small percentage of profit in any event, and we submit that some reasonable test period should have been required, to see whether such profits would not be increased, and to what extent, before the rates were summarily suspended by the temporary injunction issuing from the Federal Court below.

Minnesota Rate Cases, 230 U. S. 352, 436.
Willcox v. Consolidated Gas Co., 212 U. S. 19, 41, 51, 54-55.
Knoxville Water Co. v. Knoxville, 212 U. S. 1.
Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, p. 98.
Lincoln Gas & Electric L. Co. v. Lincoln, et al., 250 U. S. 256, 262, 268.
Des Moines Gas Co. v. Des Moines, 238 U. S. 153.

POINT VII.

We respectfully submit that the decree appealed from should be reversed with costs to the appellants.

Dated, January 29th, 1923.

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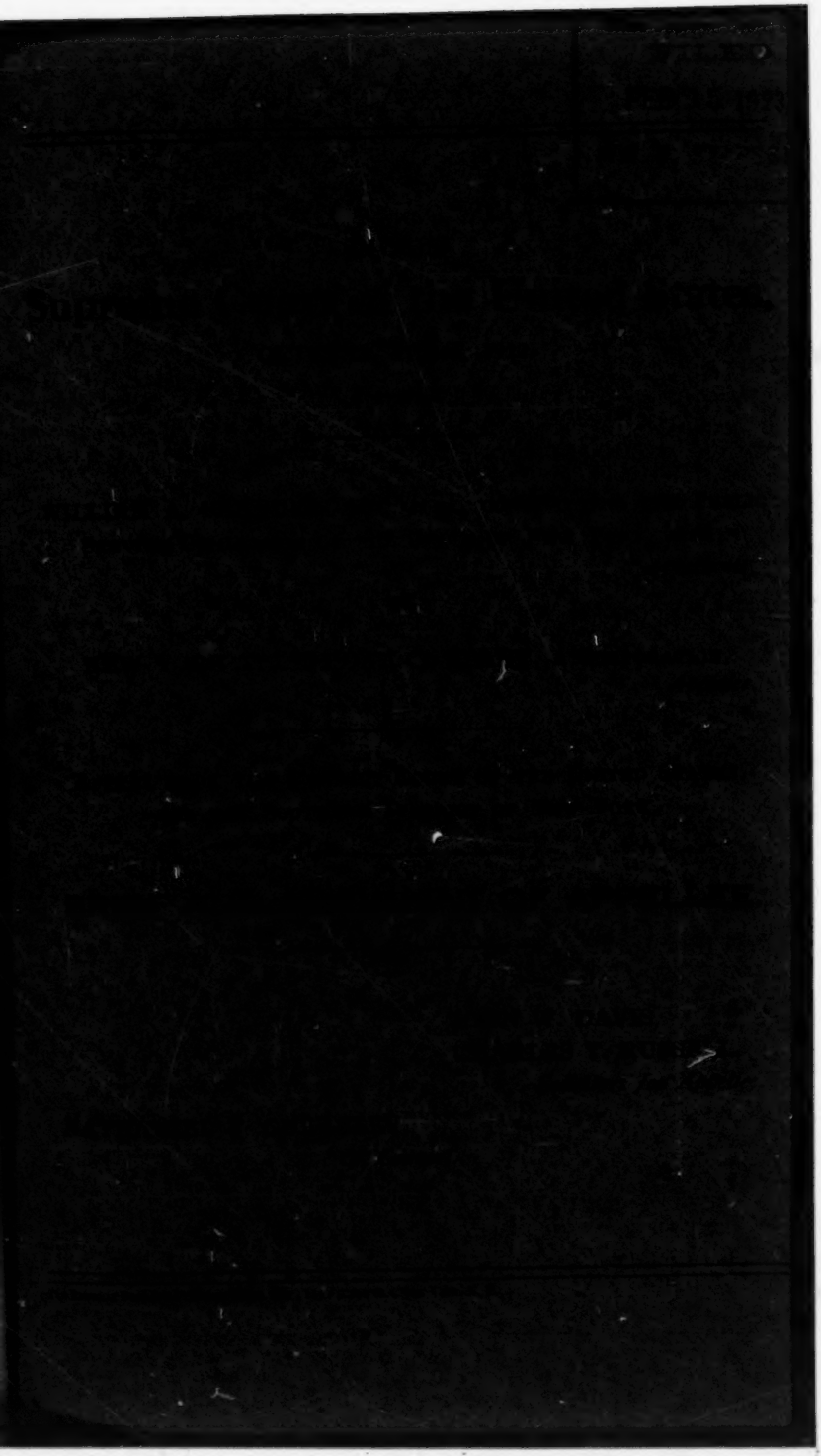

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Supreme Court of the United States.

OCTOBER TERM, 1922.

WILLIAM A. PRENDERGAST, *et al.*, constituting the Public Service Commission of the State of New York, *et al.*, *Appellants*, AGAINST NEW YORK TELEPHONE COMPANY, a Corporation, *Appellee.*	No. 542.

BRIEF OF APPELLEE.

Statement.

The appellee, the New York Telephone Company, for a long time has owned and operated a telephone system and has furnished telephone service throughout the state of New York, as well as in the state of New Jersey and a small portion of the state of Connecticut.

Prior to November 10, 1921, there were pending before the Public Service Commission of the state of New York a large number of proceedings affecting the Telephone Company's exchange rates in The City of New York and in a large number of other cities, towns and villages throughout the state. On November 10, 1921, the Commission deemed it wise "to condense the whole situation in New York state into one state-wide case (Case No. 377)" (Affi-

davit of Prendergast, Transcript, p. 103.) so as to establish a single balanced schedule of rates for the entire state. After various hearings in this proceeding, on March 3, 1922, the Commission issued the so-called *temporary* order which is in controversy in this case. This order, although in two parts, is in effect a single order of the Commission establishing a schedule of exchange rates for the entire state, effective April 1, 1922. The order filed in the state-wide case No. 377 (Transcript, p. 29), divides the exchanges of the state into various groups and provides the rates for each group. Under this order, The City of New York is made Group XI, for which it fixes rates as follows (Transcript, p. 37):

> "The rates for this group shall be as prescribed in the order of March 3, 1922, in case No. 7720, upon terms and conditions as therein set forth."

The order in case No. 7720 is set out in the Transcript at page 27.

The rates in effect in The City of New York at the time these orders were made were rates theretofore fixed under earlier orders of the Commission. The history of the rate changes of the appellee in said City and throughout the state of New York is set forth in the affidavit of Mr. Frankland Briggs at page 69 of the Transcript.

The schedule of exchange telephone rates for the state of New York, established by the temporary orders of March 3, 1922, effected an annual reduction in the revenues of the Telephone Company, estimated by it at $2,900,000, and by the Commission at $2,700,000 (Appellant's Brief, p. 42).

Under these circumstances, the Telephone Company filed its bill to enjoin the enforcement of these

rates as confiscatory. After a hearing before three judges, the temporary injunction order from which this appeal is taken was granted. The Telephone Company has maintained and continued to charge up to this time the rates which were in effect when the temporary orders of March 3, 1922, were made.

As appears from the affidavits attached to the motion to dismiss or affirm which has been filed herein by the appellee, the Public Service Commission of New York, on January 25, 1923, finally disposed of this State-wide proceeding by the entry of final orders in its said cases No. 377 and No. 7720, the effect of which was to establish a complete schedule of telephone rates for the state of New York which will afford to the New York Telephone Company an annual revenue of not less than $2,000,000 in excess of the revenue afforded by the rates in effect when the orders of March 3, 1922, were entered, and of approximately $5,000,000 in excess of the revenue which would have been afforded by the schedule of rates fixed by the said temporary orders of March 3, 1922. Therefore the *final* orders of the Commission established that the schedule in effect prior to and at the time of its orders of March 3, 1922, was too low in the amount of $2,000,000 per annum, and that the proposed schedule fixed by the *temporary* orders of March 3, 1922, was too low in the amount of approximately $5,000,000 per annum.

It is in view of this situation that the reasons must be considered which the appellants here urge to support their contention that the court below erred in granting an interlocutory injunction against these so-called temporary rates.

SUMMARY OF ARGUMENT.

I.

Upon the established facts the interlocutory injunction order should have been granted. Under these circumstances it will not be set aside on appeal on account of irregularities.

The final orders of the Commission establish the correctness of the decree appealed from.

The fact that the decree was right eliminates questions as to technical informalities. *Mississippi Valley Trust Co.* v. *Railway Steel Spring Co.*, 258 Fed. 346; *High on Injunctions*, Sections 162, 1482.

II.

The court below was properly constituted of three judges.

(*a*) No error is assigned upon this point.

(*b*) The point is decided against the appellant in *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission et al.*, 43 S. C. Rep. 75, decided November 20, 1922.

The rule was established nearly ten years ago in *Louisville & Nashville Railroad Co.* v. *Railroad Commission*, 208 Fed. 35, and has been consistently followed since then.

(*c*) If three judges were not required, the fact that an additional Circuit Judge and an additional District Judge signed the decree in this case would not invalidate it.

III.

The alleged imperfections of the bill.

The bill is sufficient, and if it were informal, this would be immaterial.

IV.

The orders of March 3, 1922, complained of in this suit were a final legislative act of the state, and the matter had reached the judicial stage.

(*a*) The fact that the orders were called temporary does not make them any less final in a jurisdictional sense.

The legislative act involved in these orders was complete and final. Unless restrained, the rates were effective and confiscated appellee's property. The Constitution is a barrier to confiscation for even a single day. *Love* v. *Atchison, Topeka & Santa Fe Ry. Co.* (C. C. A., 8th Cir.), 185 Fed. 321, 327; same case in Circuit Court, 174 Fed. 59; *Northwestern Bell Telephone Co.* v. *Hilton,* 274 Fed. 384, 393.

Wisconsin & Minnesota Light & Power Co. v. *Railroad Commission of Wisconsin,* 267 Fed. 711, is distinguished by its facts.

(*b*) An application to the Commission for a rehearing is not a necessary preliminary to the bringing of the suit.

A rehearing is obviously a matter of grace and not of right. The appellee was not required to apply for it.

Hollis et al. v. *Kutz et al.*, 255 U. S. 452;
Baltimore & Ohio R. R. Co. v. *Railroad Commission of Indiana*, 196 Fed. 690;
In re Arkansas Rate Cases, 187 Fed. 290;
Atchison, Topeka & Santa Fe Ry. Co. v. *Love*, 174 Fed. 59.

The New York statute follows Section 16-*a* of the Act to Regulate Commerce. Therefore *Atlantic Coast Line R. R. Co.* v. *Interstate Commerce Commission*, 194 Fed. 449, is directly in point. See also *Chicago Railways Co.* v. *Illinois Commerce Commission*, 277 Fed. 970.

Palermo Land & Water Co. v. *Railroad Commission of California*, 227 Fed. 708, is distinguished by the fact that the California statute required an application for a rehearing.

(*c*) The legislative act was complete with the entry of the orders.

The review by certiorari provided under Article 78 of the Civil Practice Act of New York is purely judicial. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, is not in point.

The instant case is ruled by *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134; *Detroit & Mackinac Ry. Co.* v. *Michigan R. R. Commission*, 235 U. S. 402.

(*d*) To apply the doctrine of comity here would result in irreparable injury to the appellee.

In the *Prentis* case the court puts the protection of the rights of the parties above the question of order of procedure.

V.

It was not necessary to present to the court below the evidence which had been taken by the Public Service Commission in the proceeding pending before it.

VI.

The proof presented to the court below was sufficient.

VII.

No test of the rates in question was necessary.

The proposed temporary rates decreased rates already tested and found inadequate.

VIII.

In Conclusion.

Whether a temporary injunction should be awarded rests in the sound discretion of the trial court. Its conclusion will not be interfered with except for strong reasons.

Meccano, Ltd. v. *Wanamaker,* 253 U. S. 136;

City of Amarillo v. *Southwestern Telegraph & Telephone Co.,* 253 Fed. 638.

In the instant case the final order of the Commission shows that the injunction was properly granted, and it is impossible to infer an abuse of discretion by the trial court.

ARGUMENT.

I.

Upon the established facts the interlocutory injunction order should have been granted. Under these circumstances it will not be set aside on appeal on account of irregularities.

The final orders of the Commission in this case leave no room for doubt as to the Telephone Company's right to an interlocutory injunction against the orders of March 3, 1922. Under these circumstances, the rule as to motions to set aside injunctions is applicable. Where the facts justify the injunction, it will not be set aside because of irregularities in procedure. Here the final orders of the Commission vindicate the decree below. The fact that this decree was right eliminates questions as to technical informalities on an appeal.

This is the settled rule. In *Mississippi Valley Trust Company* v. *Railway Steel Spring Co.*, 258 Fed. 346, an appeal from a temporary injunction, the Circuit Court of Appeals for the Eighth Circuit, in applying the rule, said:

> "It is a well-recognized practice, upon applications for dissolution of restraining orders or preliminary injunctions on the ground of irregularities, to deny such petition, if at the time of the hearing the court is of opinion that such restraining order or preliminary injunction should issue in view of all the facts and circumstances then existing."

See also for illustration of this rule *High on Injunctions*, Sections 162, 1482.

II.

The court below was properly constituted of three judges.

The first point of the appellant is that the court below should have been a single judge, and should not have been constituted of three judges.

(*a*) In the first place, it should be noticed that there is no assignment of error raising this point.

(*b*) The point is decided against the appellant in *Cumberland Telephone and Telegraph Company* vs. *Louisiana Public Service Commission et al.*, 43 S. C. Rep. 75, decided November 20, 1922.

There, where a court of three judges had declined to issue a temporary injunction against some rates established by the Louisiana Commission, this court held that the single judge who had granted the restraining order had no power to continue such order in effect pending an appeal.

Nearly ten years ago, in *Louisville & N. R. Co.* v. *Railroad Commission*, 208 Fed. 35, this question was considered and the conclusion was reached that in a case such as the one at bar three judges are necessary. From that time to this, with the single exception of the *Michigan Telephone Company* case (283 Fed. 139), cited by appellant, this construction of the act has been accepted and followed.

We quote from the *Louisville & Nashville Railroad Company* case as follows:

> "The application for an interlocutory injunction was made to the District Court on the ground that the order of the Alabama Railroad Commission is violative of the federal Constitution. The District Court (Hon. W. I. Grubb presiding), pursuant to the Act of

March 4, 1913, c. 160, 37 Stat. 1013, amending section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 237]), called to his assistance, to hear and determine the application, Circuit Judges Pardee and Shelby. On the argument at the hearing of the application, no formal objection was made to such action of the district judge, but it was suggested by one of the solicitors for the plaintiff that the statute requiring the judge to whom the application was made to call other judges was not applicable because the prayer for injunction was not based on the ground of the unconstitutionality of a statute.

The suggestion raises a question as to the legality of the organization of the court with three judges and is the first thing to be considered.

The following are the parts of the statute most relevant; the addition made by amendment being placed in italics:

> 'No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, *or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state,* shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be

> either circuit or district judges, and unless a majority of said three judges shall concur in granting such application.' Judicial Code, § 266; 36 Stat. 1162; 37 Stat. 1013.

The suggestion of counsel is that the amendment left the statute still requiring that the application should be made upon the ground of the 'unconstitutionality of such statute', and does not in words make it apply to the unconstitutionality of an order made by a board or commission. The intention of Congress in enacting the statute must control in its interpretation if that intention can be ascertained by an examination of the amendment in connection with the section as it stood before the amendment. The section, before amendment, required a judge, when an application was made to him for an interlocutory injunction upon the ground of the 'unconstitutionality' of a statute, to call to his assistance two other judges to sit with him on the hearing of the application. The intention of the amendment was to extend the original statute so as to have it include 'an order made by an administrative board or commission' acting under and pursuant to the statutes of a state. The title of the act strongly indicates that such was the intention:

> 'An act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a state or of an order made by an administrative board or commission created by and acting under the statute of a state.' 37 Stat. 1013.

When the application for the interlocutory injunction is to restrain the execution of a statute of a state, to make the statute requiring the three judges applicable, the application must be 'upon the ground of the unconstitutionality of such statute'. To make the words 'upon the ground of the unconstitutionality of such statute' applicable literally to

suits to enjoin the enforcement of an order of a board or commission would permit the amended statute to have application only when the statutes creating a commission were alleged to be unconstitutional. At the time of the passage of the amendment, the constitutionality of statutes creating such commissions was so well settled that it is clear that Congress did not have in view suits attacking such statutes. It had in mind, as the title and the act both show, the orders made by a board or commission. The amended statute, by its words, extends to an application to enjoin the enforcement of any order made by an administrative board or commission acting under and pursuant to the statutes of a state. If the words limiting the application of the amendment, when it is sought to enjoin the enforcement of a statute to cases where it is alleged that the statute violates the Constitution, are to be applied also to cases where it is sought to enjoin an order of a commision, the word 'unconstitutionality' must be made to apply to the order of the Commission and not to a statute. When the power to regulate rates is exercised by the Legislature directly, the statute as originally enacted and as amended, is applicable when such legislation is attacked as violative of the Constitution; and when the Legislature delegates its power to regulate rates to a commission, and the order of the Commission is attacked because it is violative of the Constitution, the amendment was intended to make the procedure requiring three judges applicable. The Commission's order is the exercise of a legislative function and was thought by some to be within the meaning of section 266 as originally enacted. The amendment, at least, was clearly intended to include orders by a commission that are alleged to be violative of the Constitution. While not controlling, it may be mentioned that it appears from the discussion of the amendment in the House of

Representatives, when it was on its passage, that such was there understood to be its purpose. Congressional Record (3d Session, 62d Congress, March 3, 1913) vol. 49, p. 4781. Whether the amendment extends the procedure requiring three judges to applications to enjoin every order that the Commission may make is not a question before us. It is sufficient for this case to hold that it extends to any order made which is alleged in the application for an interlocutory injunction to be violative of the federal Constitution. To hold otherwise would make the amendment practically ineffective and defeat the legislative intention" (pp. 37 & 38).

(c) The case at bar was entitled "In the District Court of the United States for the Southern District of New York." The restraining order, so entitled, is signed by a district judge. In its last paragraph (Transcript, p. 93) the motion for a preliminary injunction is set down for hearing; the paragraph concluding in the following language:

> "and I hereby call to my assistance at the hearing of said motion the Honorable Charles M. Hough, a Circuit Judge of this Circuit, and the Honorable John C. Knox, a District Judge of this District."

The interlocutory injunction order complained of is entitled (Transcript, p. 186). "At a Term of the United States District Court held in and for the Southern District of New York." Then follows a statement of the judges present, and the title of the case. The order then states:

> "This cause came on to be further heard before the Honorable Charles M. Hough, Circuit Judge of this Circuit, the Honorable Augustus N. Hand, and the Honorable John C. Knox,

> District Judges of this District, pursuant to the order herein, dated and filed on the 30th day of March, 1922,"

which was the restraining order above referred to. The order is signed by the Circuit Judge and by each of the District Judges.

If in fact this was not a case for a specially constituted court of three judges, clearly the order of the District Court is not invalidated by the fact that the District Judge called in two other judges to sit with him and that both of these judges concurred in and signed the order which the District Court made.

III.

The alleged imperfections of the bill.

As their second point, counsel for appellants assert that the bill is defective because certain facts are not alleged with sufficient particularly, and because of the omission to charge that if a petition for rehearing had been filed with the Commission, the Commission would in bad faith have refused a prompt hearing upon it.

Parenthetically, does appellants' argument that the bill should have so charged, imply that this is the fact?

It is unnecessary to consider these matters in detail. Examination of the bill will disclose that while it does not plead matters of evidence with the particularity which counsel seem to believe necessary, it does distinctly allege every ultimate fact necessary to the plaintiff's cause of action.

Moreover, the defendant answered, and the

record shows no attack upon the form of the bill until this court is reached.

A temporary injunction order, properly granted upon the facts, will not be disturbed on account of informalities in the pleadings.

IV.

The orders of March 3, 1922, complained of in this suit were a final legislative act of the state, and the matter had reached the judicial stage.

The third point of the appellants is in effect that this suit was prematurely brought because the orders were designated as temporary orders and because the Telephone Company did not file a petition for rehearing before the Commission.

(a) *The fact that the orders were called temporary does not make them any less final in a jurisdictional sense.*

The orders were made while the state-wide proceeding was pending, and are in express terms temporary and without prejudice to the final determination of the Commission.

They would have been final, however, for any period during which they remained in effect. In terms they required the Telephone Company to put the rates in effect on April 1, 1922. Nothing remained to be done by the Commission. Nothing that it could do could add to the force of these orders. The legislative act was so entirely com-

plete that the only alternatives presented to the Telephone Company were either compliance or a suit, if it was to avoid the penalties prescribed by the act. During whatever period these rates were in effect they would confiscate the appellee's property and this confiscation would be actual and final. The Constitution is a barrier to confiscation for even a single day. *Love* v. *Atchison, Topeka & Santa Fe Ry. Co.* (C. C. A., 8th Cir.), 185 Fed. 321, 327. See also the above case in the Circuit Court, 174 Fed. 59; and *Northwestern Bell Telephone Co.* v. *Hilton,* 274 Fed. 384, 393. The court below summed this up in two sentences (Transcript, p. 181) as follows:

> "The orders complained of are called 'temporary', but the description is immaterial if they are really confiscatory. As matter of law there is no difference between the permanent and temporary confiscation or deprivation of that to which the complaining party is entitled,—in this case a fair return."

This adequately disposes of the matter.

The case upon which the appellants rely, *Wisconsin and Minnesota Light & Power Co.* vs. *Railroad Commission of Wisconsin,* 267 Fed. 711, is readily distinguishable. There the Commission was conducting a hearing as to rates in some thirty different municipalities and had handed down its decision as to only three of them. The suit brought embraced the entire investigation covering all the municipalities concerned. The court held the action as framed to be premature, but said that if the plaintiff were attacking only the rates in the three municipalities passed upon, a different question would have been presented.

The bringing of the instant suit did not affect the

hearing pending before the Commission, which proceeded to a final determination.

(b) *An application to the Commission for a rehearing is not a necessary preliminary to the bringing of the suit.*

Section 22 of the Public Service Commission law of New York provides for a rehearing if in the judgment of the Commission "sufficient reason therefor be made to appear." Such an application, however (see the same section), "*shall not excuse any corporation or person from complying with or obeying any order or any requirement of any order of the Commission, or operate in any manner to stay or postpone the enforcement thereof except as the Commission may by order direct.*"

The rehearing is obviously a matter of grace and not of right. No time is specified within which it shall be sought, nor is there any period provided during which the order shall be in suspense pending such an application. On the contrary, all orders, notwithstanding this section, are final when made and require no further or additional action. Indeed, as if to make this doubly clear, Section 22 goes on to provide that

> "An order made after any such rehearing abrogating or changing the original order shall have the same force and effect as an original order *but shall not affect any right or the enforcement of any right arising from or by virtue of the original order.*"

In *Hollis et al.* v. *Kutz et al.*, 255 U. S. 452, a suit was brought by private consumers assailing an order of the District Commission fixing prices for gas, upon the ground that the plaintiffs' constitutional rights were violated because the rates

charged the United States and the District and certain other consumers were less than those charged the plaintiffs. The plaintiffs had not been parties to the proceeding before the Commission and did not apply to the Commission for any modification of its order before bringing their suit. In disposing of the matter, the court uses this significant language:

> "We do not perceive any advantage in requiring a party to file a complaint asking the Commission to review a decision just reached by it after a public hearing, nor do we see such a requirement in the statute" (p. 454).

The case of *Baltimore & Ohio R. R. Co.* v. *Railroad Commission of Indiana,* 196 Fed. 690, is on all fours. Suit was there brought to enjoin the Commission from enforcing its order prescribing regulations as to locomotive headlights. The case was referred to a master, before whom it was contended that application should have been made for a rehearing before the institution of the suit. The master rejected this contention and the court adopted his report in its entirety (see pp. 693 and 694). The statute of Indiana provided that

> "the Commission shall have power to grant rehearings," etc.

The court says, as to this provision:

> "it confers an authority instead of a remedy."

The court further says:

> "It is nowhere provided that a party shall ask for a rehearing by the Commission previous to the institution of a suit against it, and error could not be predicated on the failure of a party to ask for such rehearing."

The discussion of the point is short, and the *Prentis* case is expressly distinguished.

In re Arkansas Rate Cases, 187 Fed. 290, was a suit to enjoin the enforcement of an order of the Commission. It was contended that the plaintiff should have first applied to the Commission for a modification of its order. This contention was rejected. The case was reversed (230 U. S. 553), but on other grounds.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Love,* 174 Fed. 59, suit was brought to enjoin the enforcement of certain passenger rates prescribed by the state constitution of Oklahoma. The constitution empowered the Commission, upon satisfactory proof, to exempt any railroad company from the operation of these rates. Because the plaintiff did not invoke the jurisdiction of the Commission, it was contended that the action was premature. The court rejected this contention, holding that the constitutional provision was not different from a legislative act fixing rates, and committing to some tribunal jurisdiction to determine their reasonableness.

It is clear that the draughtsman of Section 22 of the New York Public Service Commission law had before him Section 16-*a* of the Act to Regulate Commerce (June 29, 1906, amendments), which he followed in substance and almost in exact words, so that decisions under this act are directly in point.

In *Atlantic Coast Line R. R. Co.* v. *Interstate Commerce Commission,* 194 Fed. 449, which was a suit before the commerce court to annul an order of the Commission, there was a demurrer to the complaint upon the ground, among others, that certain of the complaining companies had not been parties to the proceeding before the Commission

and that before they could be heard it was necessary that they apply to the Commission for a rehearing and modification of the orders in question. The court says at page 452:

> "While we think it is entirely proper for parties against whom an order has been made to apply to that body for a rehearing, we know of no rule that makes it a condition precedent to the bringing of a suit in this court for the purpose of setting aside the order."

The above case was cited by this Court in *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, at page 563.

In *Chicago Railways Co.* v. *Illinois Commerce Commission,* 277 Fed. 970, decided January 9, 1922, by three judges, the court has this to say upon this question:

> "The defendants urge *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, as defeating the jurisdiction of this court, because the record does not disclose that the plaintiffs have applied for the rehearing provided for in section 67 of the Public Utilities Act.
>
> "The order of the Illinois Commerce Commission was a complete exercise of the legislative power of the state, and was in force immediately after its passage, notwithstanding a motion to reconsider might have been urged and entertained. If the state of Illinois, vesting the power to regulate rates in the Commerce Commission, had provided that the orders of the Commission should not be put into effect until after a certain time, within which an application for a rehearing could be made, another question would be involved; but the statutes of Illinois did not so provide, and, the granting or denying of a petition for rehearing being wholly within the discretion of the commission, the legislative act was complete upon the entry of the order."

Palermo Land & Water Co. v. *Railroad Commission of California,* 227 Fed. 708, is clearly distinguished by the fact that the California statute required a petition to the Commission for a rehearing as a condition precedent to any judicial proceeding affecting an order of the Commission. The provision of the statute is as follows (California Commission Law, Section 66):

> "No cause of action arising out of any order or decision of the Commission shall accrue in any court to any corporation or person unless such corporation or person shall have made before the effective date of said order or decision, application to the Commission for a rehearing."

Whether this decision is sound or not is debatable, but conceding this *arguendo,* it is clearly distinguishable.

(c) *The legislative act was complete with the entry of the orders.*

The review by certiorari provided under Article 78 of the Civil Practice Act of the State of New York is purely judicial. The questions to be determined in a certiorari proceeding are stated in detail in Section 1304 of the Civil Practice Act (Laws N. Y. 1920, Ch. 925), and the authority of the court on the hearing is further defined by Section 1305. It is clear from these sections that the authority which the court exercises is purely judicial and has no legislative character. The doctrine in *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, is therefore inapplicable in the state of New York. In that case, suit was brought in the United States District Court to enjoin an order of the Public Service Commission of Virginia fixing rates. The statutes of Virginia provided for an appeal from

the order of the Commission to the Court of Appeals of the state, which was vested with legislative authority to substitute such rates as it might deem just and reasonable. It was held accordingly that the legislative process was not exhausted when the suit was brought in the United States District Court, and that that court should have declined, for reasons of comity, to proceed until an appeal to the state court had first been prosecuted.

The instant case is ruled by *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134; *Detroit & Mackinac Ry. Co.* v. *Michigan R. R. Commission*, 235 U. S. 402.

(d) *The comity doctrine is not applicable to the facts of this case.*

The doctrine of the *Prentis* case is not that the court had no jurisdiction, but that under the circumstances of that case comity impelled it to refuse to exercise its jurisdiction. It will be noticed, however, that the court put the protection of the rights of the parties above the question of orderly procedure. There was doubt as to whether the time for an appeal to the Supreme Court of Appeals of Virginia had not expired. If it had, the utilities in that case would have been left without a remedy. So that, recognizing the doctrine of comity this Court carefully postponed enforcing it until it appeared that its enforcement would not impair the rights of the utilities.

In the instant case the court below had jurisdiction. To enforce this doctrine of comity by setting aside the interlocutory injunction order upon this appeal would subject the Telephone Company to claims for the difference between the rates actually charged after April 1, 1922, and those prescribed by the orders in question. It would leave the Telephone Company without any remedy in a situation

where the justness of its position is confirmed by the final order of the Commission.

Such a result does not accord with the fundamental ideas that underlie comity.

V.

It was not necessary to present to the court below the evidence which had been taken by the Public Service Commission in the proceeding pending before it.

The fourth point of the appellants is novel. It is that the decree should be set aside because upon the application for the temporary injunction order there were not presented to the court the 4,780 pages of testimony said to have been received by the commission (Appellants' Brief, bottom of page 33 and page 34) in these proceedings.

There was an obligation on the part of the Telephone Company to present *prima facie* evidence that it was entitled to the relief which it demanded, and this it did. It had the right to establish these facts by any proper proof. It was not confined to the evidence taken before the Commission or to any specific proof. Moreover, upon a preliminary hearing the court below might very properly have objected to the mass of testimony taken by the Commission.

VI.

The proof presented to the court below was sufficient.

The fifth point of the appellants is that the proof presented to the court below was inadequate. In

view of the final orders of the Commission, what the appellants practically say to the Telephone Company is: "You are entitled to the relief which the court granted to you as we ourselves have found, but the decree should be reversed because you failed to prove this with the required certainty and particularity." It is to be observed that the cases cited refer to proof on final hearing.

The fact is that the Telephone Company supported its application by evidence showing the cost of the property, what it would cost to reproduce it, its present value, its revenue and its expenses.

We cannot conceive it to be necessary to go at length into this question. The court below said in its opinion, Transcript, page 185:

> "But in considering what is a fair rate, it is to be observed that no computation can reduce the basis for return much below $300,000,000. That is to say the cost of reproduction less depreciation is (as above stated) considerably more than that sum; while the cost of reproduction new, less the plaintiff's accumulated reserve for depreciation and amortization, also amounts to substantially the same $300,000,000."

At the bottom of page 40 of Appellants' Brief, counsel refer to this finding as follows:

> "The court below, on the affidavits submitted, concluded that the basis for a return would not be much below $300,000,000; yet Mr. Weber, Chief Accountant of the Commission, in his affidavit (p. 153) states that the actual investment of the company as of October 31, 1921, according to the company's own statement, was only $166,000,000 (p. 153), and that, in addition to that, the company

had a depreciation reserve balance of $80,624,649.76 (p. 154) and a surplus or undivided profits of $36,867,369.64 (p. 153)."

This statement might easily be misleading. In a counter-affidavit by Mr. Wiley (Transcript, p. 169), the exhibit referred to by Mr. Weber is set out. From this it appears that the $166,000,000 referred to as the company's investment does not represent the company's investment but simply the amount of its outstanding stock, (which apparently is all that Weber meant by investment) and that additional investment had been made, largely out of money secured from loans, (Transcript, p. 169), to the amount of $168,030,842.71. That is, the actual investment is more than twice the amount stated in appellants' brief. It also appears that the balance sheet in question covered the company's entire business with a total of $460,285,264.74, and that the surplus referred to, amounting to about eight per cent of the total assets, had been built up in twenty-five years. (Transcript, p. 170.)

The statement on page 41 of appellants' brief, "The court below found an assumed net income for 1922 of $13,622,800" might also be misunderstood. We quote from the Transcript, p. 185, the portion of the court's opinion to which the appellants refer:

"It follows that under the same rates and without any expansion or increase in telephone calls, a year's business would be	8,122,800
Assume that to this be added by transfer from depreciation and license charges *ut supra*.....	5,500,000
There results an assumed income for 1922 of	$13,622,800

But it is computable, has been computed, and is not denied that if the reductions now ordered had prevailed during the whole of the year 1921, there would have resulted a loss of income of.....	1,700,000
So that the income allowed by the Commission is not greater than	11,922,800

And it will be noted that the assumed loss of $1,700,000 is computed in part upon the income of the first quarter of 1921, when the rates prescribed were considerably lower than during the other three quarters of that year; so that the stated loss of $1,700,000 is a confessed underestimate. This is materially less than 6% upon Mr. Maltbie's estimate of the cost of plaintiff's plant."

It is obvious that here the court was not attempting to forecast the actual net income. The court indulged in these assumptions in order to test the Telephone Company's right to an interlocutory injunction upon the appellants' theory as to the facts.

The entire argument of the appellants upon this proposition is based upon the opinion of Mr. Maltbie ("it can hardly be called evidence", opinion of court below, Transcript, p. 182) instead of upon the facts shown by the evidence and found by the court below. By the application of his theories, an actual net income of about $8,000,000 grows to over $15,000,000, and the factor of value to which this is to be applied is reduced to $166,000,000, something over half of the actual cost of the property in controversy. The entire unreliability of this computation is illustrated by the fact that this

$166,000,000, which is not the value of the property, or the investment, but is the capital stock, represents the total capital stock of the company apportionable not only to the state of New York, but to New Jersey and Connecticut as well. A federal income tax of $500,000 is deducted from the operating expenses notwithstanding the decision of this court in *Galveston Electric Company* v. *Galveston,* 258 U. S. 388, decided April 10, 1922.

The evidence amply sustains the conclusion of the court below. A very significant item of testimony bearing on the general situation is Exhibit A to the affidavit of Mr. Andrew, opposite page 82 of the Transcript. This exhibit shows radical increases in the prices of labor and material necessarily reflected in increased operating costs and cost of reproduction. Notwithstanding this, it shows that from 1895 to 1915 the Telephone Company's revenues per station steadily decreased; and since that time that they have only slightly increased, except during a short period in 1921 when an increase in rates permitted by the commission was in effect.

VII.

No test of the rates in question was necessary.

It is argued that the temporary rates did not have a fair test. The rates in effect when the orders were made had had a fair test. The proof shows they were not compensatory but were confiscatory. The orders in question materially reduced them. No test of the rates could be required under such circumstances.

VIII.

In Conclusion.

Whether a preliminary injunction should be granted rests in the sound discretion of the trial court. Except for strong reasons, this court will not interfere with its action. In *Meccano, Ltd.* v. *Wanamaker,* 253 U. S. 136, this court said:

> "The correct general doctrine is that whether a preliminary injunction shall be awarded rests in sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. *Rahley* v. *Columbia Phonograph Co.,* 122 Fed. Rep. 623; *Texas Traction Co.* v. *Barron G. Collier, Inc.,* 195 Fed. Rep. 65, 66; *Southern Express Co.* v. *Long,* 202 Fed. Rep. 462; *City of Amarillo* v. *Southwestern Telegraph & Telephone Co.,* 253 Fed. Rep. 638. The informed judgment of the Circuit Court of Appeals exercised upon a view of all relevant circumstances is entitled to great weight. And, except for strong reasons, this court will not interfere with its action. No such reasons are presented by the present record" (p. 141).

City of Amarillo v. *Southwestern Telegraph & Telephone Co.,* 253 Fed. 638, is cited with approval in the extract just made. It was an appeal to the Circuit Court of Appeals for the Fifth Circuit from an interlocutory injunction restraining the enforcement of an increased rate. We make the following excerpt from the opinion:

> "The rule is settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial

court, and that the granting of a temporary injunction will be reviewed on appeal only if the lower court has abused its discretion or improvidently granted the writ. (Citing 195 Fed. 65; 82 Fed. 690; 199 Fed. 757). Especially will the granting of the temporary writ be upheld when the balance of injury as between the parties favors its issuance * * *.

In view of the doubt attending the questions involved, and the difficulty of properly solving them on a preliminary hearing upon affidavits, and the fact that the loss the appellee will suffer from the enforcement of the ordinance pending final hearing will be irreparable, and the possibility of so moulding the order as to protect the subscribers if the defendant should succeed upon final hearing, we are not disposed to hold that the District Judge abused his discretion in granting the writ, or ordered its issue improvidently" (p. 640).

In the case at bar there is nothing to suggest an abuse of discretion by the court below. The effect of the order appealed from was to add to the telephone bills of the subscribers, upon the average, about one cent per day—an amount entirely negligible so far as the subscribers are concerned. Because of the large number of these subscribers (787,000 in the state of New York, Transcript, pp. 9 and 39) if the injunction had not been granted the appellee would have suffered an irreparable loss of revenue at the rate of approximately $2,750,000 annually. (Transcript, p. 68; Appellants' Brief, p. 42.) The subscribers were amply protected by a bond. (Transcript, pp. 187 and 188.) The Telephone Company could only be protected by the preliminary injunction.

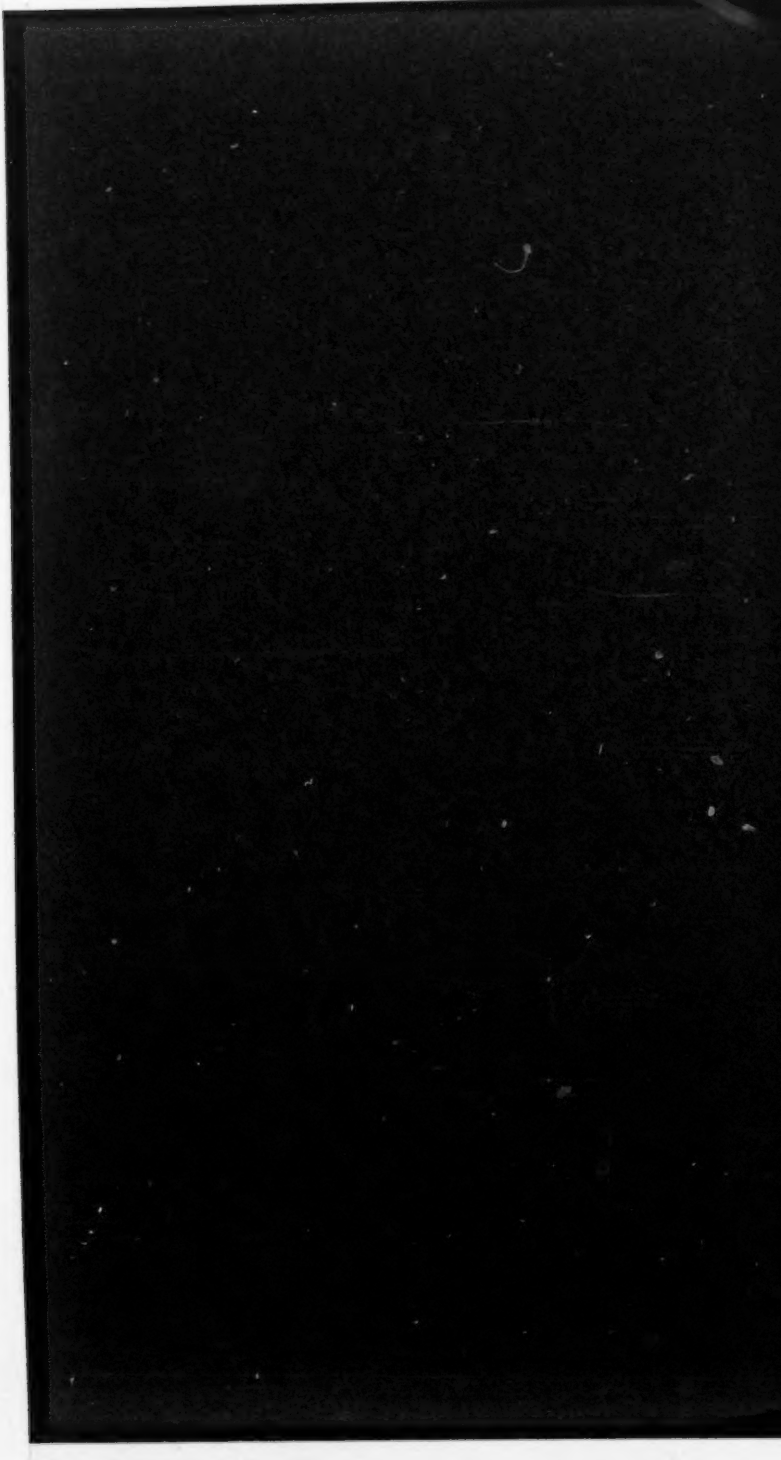
These facts, together with the fact that the final order of the Commission vindicated the rates and

charges of the Telephone Company, leave absolutely no room for doubt as to the propriety of the exercise of the discretion of the court below and the order appealed from should be affirmed.

Respectfully submitted,

JOHN W. DAVIS,
CHARLES T. RUSSELL,
Solicitors for Appellee.

NATHANIEL T. GUERNSEY,
Of Counsel.



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Supreme Court of the United States,

OCTOBER TERM, 1922.

WILLIAM A. PRENDERGAST, *et al.*, constituting the Public Service Commission of the State of New York, *et al.*, *Appellants*,

AGAINST

NEW YORK TELEPHONE COMPANY, a Corporation, *Appellee.*

No. 542.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

After the granting of the interlocutory injunction the Telephone Company maintained in effect the rates in effect when the orders in controversy were made. The Commission proceeded with its hearings in the cases in which the so-called temporary orders, in controversy in this case had been made, and on January 25, 1923, entered final orders in these cases, establishing a complete schedule of telephone rates for New York state.

The annual revenues from the schedule so established will be not less than $2,000,000 more than the revenues from the rates that have been in effect, and will be about $5,000,000 more than the revenues which the orders in controversy would have produced.

These final orders made by the Commission, whose members are appellants here, completely vindicate the court below. They preclude the appellants from urging here, or anywhere else, that there was an abuse of discretion on the part of the court below in the granting of this interlocutory injunction.

Respectfully submitted,

JOHN W. DAVIS
CHARLES T. RUSSELL
Solicitors for Appellee.

NATHANIEL T. GUERNSEY,
of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

WILLIAM A. PRENDERGAST, *et al.*, constituting the Public Service Commission of the State of New York, *et al.*, *Appellants*,

vs.

NEW YORK TELEPHONE COMPANY, a Corporation, *Appellee.*

No. 542.

Notice of Motion.

To:

Hon. Carl Sherman, Attorney-General of the State of New York, The Capitol, Albany, New York, appellant;

Wilber W. Chambers, Esq., Solicitor for Attorney-General, appellant;

Hon. Ledyard P. Hale, Solicitor for Public Service Commission and William A. Prendergast et al., members thereof, and Counsel thereto, appellants.

PLEASE TAKE NOTICE, that on Monday, the 5th day of March, 1923, at the hour of noon or as soon thereafter as counsel may be heard, the following motion to dismiss or affirm will be submitted to the Supreme Court of the United States for the decision of the Court thereon, unless the said Court shall permit the submission of the said motion to it on some earlier date.

AND PLEASE TAKE FURTHER NOTICE, that in the event that the appeal herein shall be reached for argument prior to the said 5th day of March, 1923, the solicitors for the appellee will request the permission of the Court to submit the said motion at the time of such argument.

Dated, New York, N .Y., February 13, 1923.

JOHN W. DAVIS,
CHARLES T. RUSSELL,
Solicitors for Appellee.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No. 542.

WILLIAM A. PRENDERGAST, *et al.*, constituting the Public Service Commission of the State of New York, *et al.*, *Appellants*,

vs.

NEW YORK TELEPHONE COMPANY, a Corporation, *Appellee.*

Motion to Dismiss or Affirm.

Comes now the appellee, New York Telephone Company, and respectfully moves the court to dismiss the appeal in this case or to affirm the decree of the court below, and as grounds for such motion shows:

1. That after the entry of the interlocutory decree appealed from, the appellants, the Public Service Commission of the State of New York, proceeded with hearings in the two cases Nos. 377 and 7720, in which were made the *temporary* orders in controversy establishing a schedule of telephone rates for the state of New York, and on January 25, 1923, said Commission made and filed *final* orders in the said cases and by said final orders established a complete schedule of telephone rates for the state of New York;

2. That the annual revenue which will be afforded to the appellee by the schedule of tele-

phone rates for the state of New York established by said *final* orders of January 25, 1923, will exceed by the sum of approximately $5,000,000 the revenue which would have been afforded by the schedule of rates established by the orders in controversy, made March 3, 1922, and such annual revenue under said *final* orders of January 25, 1923, will exceed by the sum of not less than $2,000,000 the revenue which is afforded by the schedule of rates in effect when the said *temporary* orders in controversy were made;

3. That it appears from the said *final* orders of January 25, 1923, that the appellee was right upon the merits of this controversy and that the injunction order appealed from was properly granted, and that there is no error in the decree of the court below.

The foregoing facts are set forth in the respective affidavits of Arthur D. Welch and Frankland Briggs, both verified the 13th day of February, 1923, which are hereto attached and made a part hereof.

Dated, New York, N. Y., February 13, 1923.

JOHN W. DAVIS,
CHARLES T. RUSSELL,
Solicitors for Appellee.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

WILLIAM A. PRENDERGAST, *et al.*, constituting the Public Service Commission of the State of New York, *et al.*, *Appellants*,

vs.

NEW YORK TELEPHONE COMPANY, a Corporation, *Appellee.*

No. 542.

Affidavits in Support of Motion of Appellee to Dismiss or Affirm.

STATE OF NEW YORK, County of New York, } ss.:

ARTHUR D. WELCH, being duly sworn, deposes and says that he is the Arthur D. Welch who is the affiant in the affidavit filed in support of the application for a temporary injunction in this suit and set forth at page 67 of the Transcript.

That he has studied the *final* orders made by the Public Service Commission in the two cases No. 377 and No. 7720 on January 25, 1923, copies of which are attached to the following affidavit of Frankland Briggs and the effect of the schedule of rates established by such final orders upon the revenues of the appellee, the New York Telephone Company.

That he estimates that the annual revenues of the New York Telephone Company to be earned or pro-

duced by the schedule of rates for intra-state telephone service in the state of New York established by the said *final* orders will exceed its annual revenues produced by the rates in effect prior to and at the time of the making of the orders in controversy dated March 3, 1922, by not less than $2,000,000, and will exceed by not less than $4,900,000 annually the revenues that would have been earned or produced by the schedule of rates sought to be established by the two *temporary* orders in controversy dated March 3, 1922;

That the rates for intra-state telephone service in the state of New York which were in effect prior to the granting of the injunction in this case have been continued in effect up to the present time;

That since March 3, 1922 there has been no material change in conditions in the state of New York affecting the revenue and expenses of the appellee.

A. D. WELCH

Subscribed and sworn to before me this 13th day of February, 1923.

LINCOLN JONES
Notary Public, Kings Co. No. 3
Cert. Filed in N. Y. Co. No. 50
Kings Co. Register No. 4004
N. Y. Co. Register No. 4045

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

WILLIAM A. PRENDERGAST, *et al.*, constituting the Public Service Commission of the State of New York, *et al.*, Appellants,

vs.

NEW YORK TELEPHONE COMPANY, a Corporation, Appellee.

No. 542.

STATE OF NEW YORK, County of New York, } ss.:

FRANKLAND BRIGGS, being duly sworn, deposes and says that he is Attorney in Charge of Commission Matters of the New York Telephone Company, the appellee in this appeal, and is the same affiant who made the affidavit which appears at page 69 of the Transcript, and that he knows of his own knowledge the facts hereinafter set out.

That after the granting of the interlocutory injunction order appealed from in this case, the appellants, the Public Service Commission of the State of New York, proceeded with the two cases in which the *temporary* orders complained of in this suit were made, and which are designated as cases No. 377 and No. 7720, and that in such cases such proceedings were thereafter had that after a full hearing the Commission entered in them its *final* orders on January 25, 1923. A true and complete copy of the said *final* order so entered in said case

No. 377 is hereunto attached and made a part hereof, marked Exhibit "1", and a true and complete copy of the said *final* order so entered in case No. 7720 is also hereunto attached and made a part hereof, marked Exhibit "2";

That in the said final order in the said case No. 7720, there is contained the following provision:

> "With respect to the provisions of certain bonds herein, given by the New York Telephone Company as principal and the American Telephone and Telegraph Company as surety, dated March 21, 1921, and July 1, 1921, the Commission determines that the rates or charges collected by the said New York Telephone Company for service rendered in the City of New York were not for the periods covered by either of said bonds unreasonable or excessive for the service furnished to subscribers of said Company in the City of New York;"

That the said bond dated March 21, 1921, was given pursuant to the provisions of the order marked Exhibit "C" to the bill of complaint in this suit, and a true and complete copy of said bond is hereunto attached and made a part hereof, marked Exhibit "3";

That the said bond dated July 1, 1921, was given pursuant to the order marked Exhibit "D" to the bill of complaint in this suit, and a true and complete copy of said bond is hereunto attached and made a part hereof, marked Exhibit "4";

That the periods covered by the said bonds begin, in the case of the bond Exhibit "3" hereto, on March 21, 1921, and in the case of the bond Exhibit "4" hereto, on July 1, 1921, and continue from the said dates uninterruptedly down to the present time;

That on July 3, 1922, the court below made an

order in this case referring it to Honorable James G. Graham, as Special Master, to hear the testimony and report his conclusions as to the law and facts, and that upon the application of the appellants hearings before the said Special Master have been postponed from time to time by orders of the court below pending the said final determination of said proceedings by the said Public Service Commission;

That on January 25, 1923, at the time of making its said final orders in the said cases No. 377 and No. 7720 the said Public Service Commission made public announcement to representatives of the press and otherwise that the annual revenues of the appellee, which it estimated would be earned under the schedule of rates for the State of New York established by the said final orders, would exceed its annual revenues produced by the rates in effect at the time the temporary orders in controversy dated March 3, 1922, were made by not less than $2,000,000.

FRANKLAND BRIGGS

Subscribed and sworn to before me this 13th day of February, 1923.

LINCOLN JONES
Notary Public,
Kings Co. No. 3
Cert. Filed in N. Y. Co. No. 50
Kings Co. Register No. 4004
N. Y. Co. Register No. 4045

Exhibit 1.

STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission, held in the City of Albany, on the 25th day of January, 1923.

Present:

WILLIAM A. PRENDERGAST, Chairman
WILLIAM R. POOLEY
CHARLES VANVOORHIS
OLIVER C. SEMPLE
CHARLES G. BLAKESLEE
} Commissioners

In the Matter of the Hearing, on Motion of the Commission, as to rates, charges and rentals, and the regulations and practices affecting the rates, charges and rentals of the New York Telephone Company.
} Case No. 877

The Public Service Commission pursuant to its Order made and filed herein on the 10th day of November, 1921, having entered upon an investigation as to the rates, charges and rentals and the regulations and practices affecting the rates, charges and rentals of the New York Telephone Company within the State of New York, and full hearings having been held,

It is the opinion of the Commission that the rates, charges and rentals of the said New York Telephone Company, and the regulations and practices affecting the rates, charges and rentals of the said Company, are, as to certain subscribers and classes of subscribers, unjustly discriminatory and unduly preferential, and as to certain other rates, charges and rentals and the regulations and practices of said Company affecting the rates, charges and rentals are insufficient to yield reasonable compensation to the said Company for services rendered by it,

And it appearing to the Commission that the rates, charges and rentals and the regulations and practices affecting the rates, charges and rentals hereinafter determined and prescribed to be observed by said Company are just and reasonable, and should be made effective as in this Order directed, it is, pursuant to the provisions of the Public Service Commission Law,

ORDERED:

(1) That the rates, charges and rentals of the New York Telephone Company, and the regulations and practices affecting the rates, charges and rentals of said Company be and the same hereby are determined by this Commission and established to be effective in the several exchange areas hereinafter prescribed according to the service rendered, as follows:

GROUP 1

Rates

Business			Residence			Rural	
1	2	4	1	2	4	Bus.	Res.
3.00	——	2.50	2.50	——	2.00	2.50	2.00
Tully			Esopus			Westchester:	
Barker			Newfield			Yorktown Heights	
Kendall			Phoenicia			South Salem	
Sharon Springs			Cayuga			Mahopac	
Campbell			Waterport			Croton Falls	
Parish			Woodstock			Carmel	
Elba			Porter Corners			Greenwood Lake	
Arkport			Shokan			Long Island:	
Cicero			Owasco			Ronkonkoma	
Varysburg			Enfield Center			Brentwood	
Pleasant Valley			Center Brunswick			Amagansett	
Osceola			North Clove			Central Islip	
Fabius			Bliss			Shoreham	
						Yaphank[1]	
						Kent Cliffs[1]	
						South Onondaga[1]	
						Hermitage[1]	
						Kings Park[2]	

[1] Rural service only furnished in these exchanges.
[2] No rural service furnished in these exchanges.

GROUP II

RATES

BUSINESS			RESIDENCE			RURAL	
1	2	4	1	2	4	Bus.	Res.
3.50	—	2.75	2.50	—	2.00	2.50	2.00
Bolton			Pawling			Westchester:	
Jonesville			Deposit			Katonah	
Voorheesville			Marlboro			Brewster	
Union Springs			Holly			Garrison	
Ransomville			Skaneateles			Cold Spring	
Averill Park			Dover Plains			Pearl River[2]	
Orchard Park			Pine Hill			Long Island:	
Canaseraga			Fleischmanns			Bellport	
Newfane			Windale			Hampton Bays	
Hyde Park			Arcade			Shelter Island	
Holland			Camden			Quogue	
Sackett Harbor			Warrensburg			East Quogue	
Forestville			Clinton Corners			West Hampton	
Alden			Stanfordville			Westbury[2]	
Wilson			Akron			Bridgehamton	
Altamont			Gowanda			Smithtown	
Lydonville			Canisteo			Easthampton	
Avoca			Attica			Farmingdale	
Constantia			Philmont			Sag Harbor	
Cleveland			New Paltz			Stony Brook	
Portville			Horseheads			Center Moriches	
Jordon			Middleport			Southold	
North Collins			Gasport			St. James	
Clinton			Cobleskill			Hicksville	
South Dayton			Valley Falls			Eastport	
Garden			Liberty			Mattituck	
Weedsport			Chatham			Northport	
Youngstown			Highland Falls			Riverhead	
Lewiston			Ellenville			Massapequa[2]	
Oakfield			Springville			Amityville	
Mexico			Baldwinsville			Islip	
Sempronius			Milton			Port Jefferson	
Moravia			Barneveld			Peconic	
Rosendale			Highland			Setauket	
High Falls			Fayetteville			Jamesport	
Williamsville			Dolgeville			Greenport	
Groton			Silver Creek			Sayville	
Cherry Creek			Goshen			Bayport	
Patterson			Canastota			Orient[1]	
Lake George			Bath			Clintondale[1]	
Castleton			East Syracuse			Burnt Hills[1]	
Liverpool			Wappinger Falls			Clarksville[1]	
Hamilton			Watkins			North Salem[1]	
Angola			Montour Falls			Commack[1]	
Amenia			Eden			South Ripley[1]	
Millbrook			Hamburg				

[1] Rural service only furnished in these exchanges.
[2] No rural service furnished in these exchanges.

GROUP III

Rates

Business			Residence			Rural	
1	2	4	1	2	4	Bus.	Res.
4.25	—	3.50	2.75	—	2.25	3.25	2.25
Saugerties			Westchester:			Long Island:	
East Aurora			Mt. Kisco			Bayshore	
Ballston			Bedford Village			Oyster Bay	
Owego			Pleasantville			Water Mill	
Schuylerville						Great Neck	
Greenwich			Long Island:				
Penn Yan			Lindenhurst			Chappaqua[2]	
Solvay			Babylon			Port Washington[2]	
Hoosick Falls			Patchogue			Roslyn[2]	
Catskill			Blue Point			Floral Park	
Medina			Manhasset			Selden[1]	
Barre Center			Huntington				
Albion			Cold Spring Harbor				
Long Beach[2]			Southampton				

[1] Rural service only furnished in these exchanges.
[2] No rural service furnished in these exchanges.

GROUP IV

Rates

Business			Residence			Rural	
1	2	4	1	2	4	Bus.	Res.
5.00	4.00	—	3.00	—	2.25	3.25	2.25
Mechanicville			Batavia			Westchester:	
Salamanca			Hudson			Spring Valley	
Oneida			Claverack			Piermont	
Lancaster			Geneva			Haverstraw	
Waterloo			Hornell			Stony Point	
Fayette			Corning			Suffern	
Seneca Falls			Endicott			Hastings	
Beacon			Ithaca[2]			Nyack	
Little Falls			Westchester:			Congers[1]	
Saratoga Springs			New City			Nanuet[1]	
Waverly			Sloatsburg			Valley Stream[1]	

[1] No rural service furnished in these exchanges.
[2] Automatic switching; no four party business service furnished in these exchanges.

GROUP V

RATES

BUSINESS			RESIDENCE			RURAL	
1	2	4	1	2	4	Bus.	Res.
5.50	4.50	——	3.25	2.75	2.25	3.25	2.25
McGraw			Westchester:			Limestone[1]	
Homer			Mamaroneck			Dunkirk[3]	
Cortland			Dobbs Ferry			Park[3]	
Lockport			Briarcliff			Irvington[3]	
Olean			Tarrytown				
Allegany			Croton			Long Island:	
Oswego			Peekskill			Glen Cove	
Rome			Ossining			Hempstead	
Ilion			Port Chester			Garden City	
Frankfort			Rye[3]			Freeport	
Herkimer						Wantagh	
Tonawanda						Rockville Center[3]	
						Lynbrook	

[1] Rural service only furnished in these exchanges.
[3] No rural service furnished in these exchanges.
[3] No four party business service furnished in these exchanges.
NOTE: Four party business measured service discontinued.

GROUP VI

RATES

BUSINESS			RESIDENCE			RURAL	
1	2	4	1	2	4	Bus.	Res.
6.25	5.25	——	3.50	3.00	2.50	3.50	2.50

Note: 4 party business in this group,
50 messages—$3.50
above 50, each—$.05

Kingston
Fort Edward
Hudson Falls
Glens Falls
Newburgh
Watertown
Poughkeepsie
Auburn
Elmira
La Salle
Niagara Falls
Amsterdam
Argyle[1]

[1] Rural service only furnished in these exchanges.

GROUP VII

Rates

Business			Residence			Rural	
1	2	4	1	2	4	Bus.	Res.
7.00	6.00	—	3.75	3.25	2.75	3.75	2.75

Note: 4 party business in this group,
50 messages—$3.50
above 50, each—$.05

Binghamton
Johnson City
Ulster Park[1]

[1] Rural service only furnished in these exchanges.

GROUP VIII

Rates

Business			Residence			Rural	
1	2	4	1	2	4	Bus.	Res.
8.00	6.75	—	4.00	3.50	3.00	3.75	3.00

Note: 4 party business in this group,
50 messages—$3.50
above 50, each—$.05

Schenectady
Whitesboro
New Hartford
Utica
Delmar
Albany
Rensselaer
Watervliet
Waterford
Cohoes
Troy

GROUP IX

Rates

Business			Residence			Rural	
1	2	4	1	2	4	Bus.	Res.
9.00	7.50	—	4.25	3.50	—	4.00	3.00

Note: 2 party measured business service,
50 messages—$3.50 per month
above 50, each—$.05

Syracuse
Prospect

GROUP X

BUFFALO

RATES

BUSINESS			RESIDENCE			RURAL	
1	2	4	1	2	4	Bus.	Res.
Flat rates:			4.75	3.75	3.00		

Message rates:

Individual line, business and residence

Local Messages sent in 1 month

80 or less	4.00
Next 120, each	.05
Next 50, each	.04
All over 250, each	.03

Note: Four party, residence only, measured service discontinued.
Outside area (see p. 3 company's present tariff schedules)

Two-party business

Local messages in 1 month:

70 or less	3.50
Next 30, each	.04
All over 100, each	.03

Four-party residence

Flat rate:

3.25

GROUP XI

NEW YORK CITY

(Comprising the Boroughs of Manhattan, The Bronx, Brooklyn, Queens and Richmond)

The rates for this group shall be as prescribed in the Order of the Public Service Commission, dated January 25th, 1923, in Case No. 7720.

SPECIAL GROUP A

Rates

Business			Residence			Rural	
1	2	4	1	2	4	Bus.	Res.
70-M-3.50	—	—	70-M-3.50	—	—	—	—

Flat rates, residence only:

Individual	4.00
2-party	3.50
4-party	3.00

Westchester
Yonkers
Pelham
Mt. Vernon
Bronxville
Tuckahoe
Larchmont
New Rochelle

The following take measured rates as in the previous group but residence flat rates as follows:

Individual	3.75
2-party	3.25
4-party	2.75

White Plains
Scarsdale
Elmsford

Note: Rural business service in the White Plains area is at $3.50 per month flat rate and in the New Rochelle area at $3.75 per month. Rural residence rates in the White Plains area are $2.75 and in the New Rochelle area $3.00.

The following message rate applies to all the foregoing message rate schedules:

Messages	Per Month
70 or less	3.50
Next 55, each	.04
All over 125, each	.03

SPECIAL GROUP B

RATES

BUSINESS			RESIDENCE			RURAL	
1	2	4	1	2	4	Bus.	Res.
6.00	—	4.75	5.50	—	4.00	—	—
			Ramapo Hills				
4.50	—	[1]2.50	7.25	—	[1]2.00	2.50	2.00
			Tuxedo				
—	—	4.00	—	—	3.25	2.50	2.00
			Derby				
5.00	—	4.00	4.25	—	3.50	2.75	2.25
			Wanakah				
—	—	—	—	—	—	4.00	3.00
			Kattskill Bay				
7.25	5.50	—	5.75	4.00	—	3.25	2.25
			Syosset				
7.75	5.75	—	5.75	4.00	—	3.25	2.25
			Brookville: Western Zone				
10.75	7.25	—	8.75	5.50	—	3.50	2.50
			Brookville: Eastern Zone				
4.75	3.75	—	3.50	3.00	—	—	—
			Cedarhurst				
7.25	5.50	—	5.75	4.00	—	3.25	2.25
			Wheatley Hills: Western Zone				
10.25	7.00	—	8.75	5.50	—	3.50	2.50
			Wheatley Hills: Eastern Zone				

[1] Multi-party service.

BUFFER ZONE TOLL RATES

Between	and	Buffer-Zone Rates Station-to-Station	Grading Changes Day Rates in Cents
Floral Park	Zone 1	14*	—
Floral Park	Zone 4	—	14*
Floral Park	Zone 5	—	14*
Garden City	Zone 1	20	—
Great Neck	Zone 1	14*	—
Great Neck	Zone 4	—	14*
Great Neck	Zone 5	—	14*
Hastings	Zone 1	20	—
Hempstead	Zone 1	20	—
Hempstead	Zone 4	—	20
Hempstead	Zone 5	—	20
Larchmont	Zone 1	20	—
Manhasset	Zone 1	14*	—
Manhasset	Zone 4	—	14*
Manhasset	Zone 5	—	14*
Mt. Vernon	Zone 1	14*	—
New Rochelle	Zone 1	14*	—
Pelham	Zone 1	14*	—
Rockville Center	Zone 1	20	—
Valley Stream	Zone 1	14*	—
Valley Stream	Zone 4	—	14*
Valley Stream	Zone 5	—	14*
Valley Stream	Astoria	—	14*
Valley Stream	Newtown	—	14*
Woodmere-Cedarhurst	Zone 1	14* (Cedarhurst)	—
Woodmere-Cedarhurst	Zone 4	—	14* (Cedarhurst)
Woodmere-Cedarhurst	Zone 5	—	14* (Cedarhurst)
Woodmere-Cedarhurst	Astoria	—	14* (Cedarhurst)
Woodmere-Cedarhurst	Newtown	—	14* (Cedarhurst)
Yonkers	Zone 1	14*	—

* Fifteen (15) cents from public telephone, toll and coin box stations.

SPECIAL TOLL RATES

Between	*Station-to-Station Rates*
Medina and Middleport	5¢
Medina and Lyndonville	10¢
Tonawanda and Buffalo	10¢
Williamsville and Buffalo	10¢
Lancaster and Buffalo	10¢
Garden and Buffalo	10¢
Olean and Portville	5¢
Albion and Waterport	5¢
Holley and Kendall	10¢
Waterport and Lyndonville	10¢
Hornell and Canisteo	5¢
Syracuse and East Syracuse	5¢
Syracuse and Solvay	5¢
Syracuse and Liverpool	5¢
Fayetteville and East Syracuse	5¢
Auburn and Owasco	10¢
Auburn and Skaneateles	10¢
Elmira and Horseheads	5¢
Endicott and Johnson City	5¢
Endicott and Binghamton	10¢
Oneida and Canastota	5¢
Glens Falls and Lake George	10¢
Troy and Centre Brunswick	5¢
Albany and Troy	10¢
Albany and Watervliet	10¢
Poughkeepsie and Pleasant Valley	10¢
WESTCHESTER	
Yonkers and Mount Vernon	5¢
Yonkers and Bronxville	5¢
Yonkers and Tuckahoe	5¢
Brewster and Croton Falls	5¢
New Rochelle and Mount Vernon	5¢
LONG ISLAND	
Bay Shore and Islip	5¢
Southampton and Water Mill	5¢
Patchogue and Bellport	5¢
Northport and Kings Park	5¢
Freeport and Rockville Centre	5¢
Freeport and Hempstead	5¢

Note: Above are subscribers' rates. In the case of public telephones, the 14 cent rates are 15 cents.

SERVICE CONNECTION CHARGES

New York City—State Outside of New York City

	Population of Towns		
	0-25,000	25,000 to 750,000	Above 750,000
I. Instruments not in place			
Business, main and trunks	$3.00	$4.00	$5.00
Residence, main and trunks	2.00	3.00	3.50
P. B. X. stations and extensions	2.00	2.50	3.00
Reconnections of equipment already in			
Business, main and trunks	1.00	1.50	1.50
Residence, main and trunks	1.00	1.50	1.50
P. B. X. stations and extensions	1.00	1.50	1.50
Take-overs without lapse in service			
Business, main and trunks. 1 unit	1.00	1.50	1.50
Business, main and trunks. 2 or more	2.00	3.00	3.00
Residence, main and trunks 1 unit	1.00	1.50	1.50
Residence, main and trunks 2 or more	2.00	3.00	3.00
P. B. X. Stations and extensions 1 unit	1.00	1.50	1.50
P. B. X. Stations and extensions 2 or more	2.00	3.00	3.00

RESTORATION SERVICE CHARGE

A restoration charge of $1.00 may be charged by said New York Telephone Company when service is restored to a subscriber denied service because of non-payment of bill.

MONTHLY SETTLEMENT

Bills for telephone service shall be rendered on a monthly basis.

PRIVATE BRANCH EXCHANGE

Business and Residence Service

	Message Rate[1]	Flat Rate[2]
Cordless switchboard (limited to 7 stations and 3 trunks)	$2.50	$2.50
Cord switchboard (limited to 30 station drops), per position	4.50	4.50
Cord switchboard (limited to 80 station drops), per position	6.00	6.00
Cord switchboard (multiple, including multiple station jacks), per position	10.00	10.00
Trunk lines:		
First, including local messages, each	Ind. line rate	Ind. line rate
Additional each	2.00	Ind. line rate
Stations:		
First 20, each	.50	1.00[3]
Above 20, each	.35	1.00[3]
Additional working station drops over 20, each	.15	——

[1] To apply in all Message Rate districts.
[2] To apply in all Flat Rate districts.
[3] Rate shown is for Business Service. For Residence Service the rate per station is $.50.

(2) That said New York Telephone Company publish and file with the Commission schedules setting forth the aforesaid rates, charges and rentals and the regulations and practices affecting said rates, charges and rentals as well as rates, charges and rentals for any and all other classes of service not herein set forth, furnished by it in its several exchange areas within the State of New York, to be effective from and after the date hereinafter set forth.

(3) That said rates, charges and rentals and the regulations and practices affecting said rates, charges and rentals are to become effective March 1, 1923, and to be thereafter observed as maximum rates, charges and rentals by the said New York Telephone Company within its several exchange areas as herein set forth, until March 1st, 1924, and thereafter until the Commission shall otherwise order.

(4) That said New York Telephone Company shall make and file with this Commission monthly statements of its revenues and expenses covering service rendered in the State of New York.

(5) That said New York Telephone Company, or any municipality affected by this Order may apply to this Commission for modification of the classifications set forth in this Order and herein prescribed, by filing application in writing, stating the reasons therefor, at the Office of the Commission in the City of Albany, New York, on or before February 15, 1923.

By the Commission,

FRANCIS E. ROBERTS
Secretary

Exhibit 2.

STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany, New York, on the 25th day of January, 1923.

Present:

WILLIAM A. PRENDERGAST, *Chairman,*
WILLIAM R. POOLEY
CHARLES VAN VOORHIS
OLIVER C. SEMPLE
CHARLES G. BLAKESLEE
} *Commissioners.*

Petition or complaint of New York Telephone Company in respect to increasing rates, charges, tolls and rentals to be charged by it for telephone service in New York City.
} Case No. 7720.

The Public Service Commission pursuant to a petition or complaint of the New York Telephone Company filed with the Public Service Commission, Second District, on the 25th day of August, 1920, having continued a hearing as to rates, charges and rentals of the said New York Telephone Company within the City of New York begun before the said Public Service Commission, Second District;

And it being the opinion of the Commission, after said hearing and consideration of the evi-

dence and exhibits presented thereon that the rates, charges, tolls and rentals of the New York Telephone Company in the City of New York for service therein furnished, are unreasonable in that they are insufficient to yield in the aggregate reasonable compensation for the service rendered and are discriminatory as between classes of subscribers;

And it appearing to the Commission that the rates, charges and rentals hereinafter determined and prescribed to be observed by the said Company are just and reasonable and should be made effective as in this order directed, it is, pursuant to the provisions of the Public Service Commission Law,

ORDERED:

1. That the rates, charges and rentals of the New York Telephone Company and the regulations and practices affecting the raise, charges and rentals of said Company within the City of New York be and the same hereby are determined by this Commission and established to be effective according to the service rendered as follows:

NEW YORK CITY.

	Business	Residence
Zone 1—Message:		
Individual	75–4.00 (*a*)	66–3.50 (*b*)
2-party	—	—
4-party	—	—
Flat:		
Individual	—	—
2-party	—	-
4-party	—	—

	Business	Residence
Zone 2—Message:		
Individual	75–4.00 (*a*)	66–3.50 (*b*)
2-party	—	57–3.00 (*c*)
4-party	—	—
Flat:		
Individual	—	—
2-party	—	—
4-party	—	—
Zone 3—Message:		
Individual	75–4.00 (*a*)	66–3.50 (*b*)
2-party	—	—
4-party	—	—
Flat:		
Individual	—	3.50
2-party	—	3.00
4-party	—	2.75
Zone 4—Message:		
Individual	75–4.00 (*a*)	66–3.50 (*b*)
2-party	—	57–3.00 (*c*)
4-party	—	—
Flat:		
Individual	—	5.25
2-party	—	4.25
4-party	—	—
Zone 5—Message:		
Individual	75–4.00 (*a*)	66–3.50 (*b*)
2-party	—	57–3.00 (*c*)
4-party	—	—
Flat:		
Individual	—	5.25
2-party	—	4.25
4-party	—	—
Zone 6—Message:		
Individual	66–3.50 (*b*)	66–3.50 (*b*)
2-party	—	—
4-party	—	—
Flat:		
Individual	4.75	3.50
2-party	3.75	3.00
4-party	—	2.75

	Business	Residence
Zone 7—Message:		
Individual	66–3.50 (*b*)	66–3.50 (*b*)
2-party	——	——
4-party	——	——
Flat:		
Individual	4.75	3.50
2-party	3.75	3.00
4-party	——	2.75
Zone 8—Message:		
Individual	66–3.50 (*b*)	66–3.50 (*b*)
2-party	——	——
4-party	——	——
Flat:		
Individual	4.75	3.50
2-party	3.75	3.00
4-party	——	——
Zone 9—Message:		
Individual	66–3.50 (*b*)	66–3.50 (*b*)
2-party	——	——
4-party	——	——
Flat:		
Individual	——	3.50
2-party	——	——
4-party	——	2.75
Zone 10—Message:		
Individual	66–3.50 (*b*)	66–3.50 (*b*)
2-party	——	——
4-party	——	——
Flat:		
Individual	——	3.50
2-party	——	——
4-party	——	2.75

Message rate extension, business and residence	$ .50
Flat rate extension, business	1.00
residence	.50
Message rate auxiliary line and station	2.25
Flat rate auxiliary line and station	Individual line rate

DETAIL OF MESSAGE RATES

	Local messages per month	Rate per message	Monthly rate
(a)	75	—	$ 4.00
Next	125	5¢	10.25
Next	100	4.5¢	14.75
Next	100	4¢	18.75
Next	100	3.5¢	22.25
Above	500	3¢	——
(b)	66	—	3.50
Next	134	5¢	10.20
Next	100	4.5¢	14.70
Next	100	4¢	18.70
Next	100	3.5¢	22.20
Above	500	3¢	——
(c)	57	—	3.00
Next	143	5¢	10.15
Next	100	4.5¢	14.65
Next	100	4¢	18.65
Next	100	3.5¢	22.15
Above	500	3¢	——

BUFFER ZONE TOLL RATES WITH THE NECESSARY GRADING CHANGES.

Between	And	Buffer Zone Rates Station-to-Station Day Rates in Cents	Grading Changes Station-to-Station Day Rates in Cents
Floral Park	Zone 1	14*	
Floral Park	Zone 4		14*
Floral Park	Zone 5		14*
Garden City	Zone 1	20	
Great Neck	Zone 1	14*	
Great Neck	Zone 4		14*
Great Neck	Zone 5		14*
Hastings	Zone 1	20	
Hempstead	Zone 1	20	
Hempstead	Zone 4		20
Hempstead	Zone 5		20
Larchmont	Zone 1	20	
Manhasset	Zone 1	14*	
Manhasset	Zone 4		14*
Manhasset	Zone 5		14*
Mt. Vernon	Zone 1	14*	
New Rochelle	Zone 1	14*	
Pelham	Zone 1	14*	
Rockville Center	Zone 1	20	
Valley Stream	Zone 1	14*	
Valley Stream	Zone 4		14*
Valley Stream	Zone 5		14*
Valley Stream	Astoria		14*
Valley Stream	Newtown		14*
Woodmere-Cedarhurst	Zone 1	14* (Cedarhurst)	
Woodmere-Cedarhurst	Zone 4		14* (Cedarhurst)
Woodmere-Cedarhurst	Zone 5		14* (Cedarhurst)
Woodmere-Cedarhurst	Astoria		14* (Cedarhurst)
Woodmere-Cedarhurst	Newtown		
Yonkers	Zone 1	14*	

* Fifteen (15) cents from public telephones, toll and coin box stations.

SERVICE CONNECTION CHARGES

NEW YORK CITY—STATE OUTSIDE OF NEW YORK CITY

		Population of Towns		
		0-25,000	25,000 to 750,000	Above 750,000
1. Instruments not in place				
Business, main and trunks		$3.00	$4.00	$5.00
Residence, main and trunks		2.00	3.00	3.50
P. B. X. Stations and extensions		2.00	2.50	3.00
Reconnections of equipment already in				
Business, main and trunks		1.00	1.50	1.50
Residence, main and trunks		1.00	1.50	1.50
P. B. X. stations and extensions		1.00	1.50	1.50
Take-overs without lapse in service				
Business, main and trunks	1 unit	1.00	1.50	1.50
	2 or more	2.00	3.00	3.00
Residence, main and trunks	1 unit	1.00	1.50	1.50
	2 or more	2.00	3.00	3.00
P. B. X. stations and extensions	1 unit	1.00	1.50	1.50
	2 or more	2.00	3.00	3.00

RESTORATION OF SERVICE CHARGE

The New York Telephone Company is authorized to charge and collect $1.00 for restoration of service after the service is denied a subscriber because of non-payment of bill.

MONTHLY SETTLEMENT

All contracts will be written and bills rendered on a monthly payment basis for all classes of service.

PRIVATE BRANCH EXCHANGE RATES

	Message Rate[1]	Flat Rate[2]
Cordless switchboard (limited to 7 stations and 3 trunks)	$2.50	$2.50
Cord switchboard (limited to 30 station drops), per position	4.50	4.50
Cord switchboard (limited to 80 station drops), per position	6.00	6.00
Cord switchboard (multiple, including multiple station jacks), per position	10.00	10.00
Trunk lines:		
First, including local messages, each	Ind. Line Rate	Ind. Line Ra
Additional, each	2.00	Ind. Line Ra
Stations:	Message Rate[1]	Flat Rate[2]
First 20, each	.50	1.00[3]
Above 20, each	.35	1.00[3]
Additional working station drops over 20, each	.15	——

[1] To apply in all Message Rate districts.
[2] To apply in all Flat Rate districts.
[3] Rate shown in for Business Service. For Residence Service the rate per station is $1.

INTERBOROUGH TOLL RATES

Zones		1	2	3	4	5	6 Bayside	6 Boulevard	6 Flushing	6 Newtown[1]	7 Hollis[2]	7 Jamaica	7 Laurelton	7 Richmond Hill[3]	8	9	10
1		L															
2		L	L														
3		L	L	L													
4		L	L	5¢	L												
5		L	5¢	5¢	L	L											
6	Bayside	10¢	5¢	5¢	L	L	L										
	Boulevard	5¢	5¢	5¢	L	L	L	L									
	Flushing	5¢	5¢	5¢	L	L	L	L	L								
	Newtown[1]	5¢	5¢	5¢	L	L	L	L	L	L							
7	Hollis[2]	10¢	10¢	10¢	L	L	L	L	L	L	L						
	Jamaica	5¢	5¢	5¢	L	L	L	L	L	L	L	L					
	Laurelton	10¢	10¢	10¢	L	L	L	L	L	L	L	L	L				
	Richmond Hill[3]	5¢	5¢	5¢	L	L	L	L	L	L	L	L	L	L			
8		10¢	10¢	10¢	5¢	L	5¢	5¢	5¢	5¢	L	L	L	L	L		
9		10¢	10¢	10¢	5¢	5¢	10¢	10¢	10¢	10¢	10¢	10¢	10¢	10¢	10¢	L	
10		10¢	10¢	10¢	5¢	5¢	10¢	10¢	10¢	10¢	10¢	10¢	10¢	10¢	10¢	L	L

"L" indicates "local" for message rate subscribers.

Where the subscriber's toll rate is L, the public telephone toll rate to be 5¢.

Where the subscriber's toll rate is 5¢, the public telephone toll rate to be 10¢.

Where the subscriber's toll rate is 10¢, the public telephone toll rate to be 10¢.

The toll rate between any flat rate local area (provided for herein) and other points, within New York City to be 5¢ except where the subscriber's toll rate for message rate service is 10¢, in such cases the 10¢ toll rate to apply.

[1] Including Havemeyer and Juniper.
[2] Including Fieldstone
[3] Including Virginia.

2. That said New York Telephone Company publish and file with the Commission schedules setting forth the aforesaid rates, charges and rentals and the regulations and practices affecting said rates, charges and rentals, as well as rates, charges and rentals for any and all other classes of service not herein set forth and furnished by it in the City of New York, to be effective from and after the date hereinafter set forth.

3. That said rates, charges and rentals and the regulations and practices affecting said rates, charges and rentals are to become effective March 1, 1923, and to be thereafter observed as maximum rates, charges and rentals by said New York Telephone Company within the City of New York as herein set forth until March 1, 1924, and thereafter until the Commission shall otherwise order.

4. That said New York Telephone Company shall make and file with this Commission monthly statements of its revenues and expenses for service rendered in the City of New York.

5. That said New York Telephone Company or the City of New York may apply to this Commission for modification of the classifications set forth in this order and herein prescribed, by filing application in writing stating the reasons therefor, at the office of the Commission in the City of Albany, New York, on or before February 15, 1923.

6. With respect to the provisions of certain bonds herein, given by the New York Telephone Company as principal and the American Telephone and Telegraph Company as surety, dated March 21, 1921,

and July 1, 1921, the Commission determines that the rates or charges collected by the said New York Telephone Company for service rendered in the City of New York were not for the periods covered by either of said bonds unreasonable or excessive for the service furnished to subscribers of said Company in the City of New York.

By the Commission,

FRANCIS E. ROBERTS
Secretary.

Exhibit 3.

WHEREAS the Public Service Commission for the Second District of the State of New York in a proceeding entitled *"In the Matter of the Application of the* NEW YORK TELEPHONE COMPANY *for the Consent of the Commission to the establishment of a New Schedule of Rates for Telephone Service in the City of New York—Case No. 7720"*, under and by virtue of the authority conferred upon it by the Public Service Commissions Law, has issued an order dated the seventeenth (17th) day of March, One Thousand Nine Hundred Twenty-one (1921), containing the following provisions:

> "IT IS THEREFORE ORDERED that pending the further continuation of this proceeding, and without affecting the final determination thereof, this Commission does hereby consent that, from and after April 1, 1921, and until its further order in the premises, the rates of said New York Telephone Company, for exchange telephone service, in the city of New York, as fixed and determined by the said orders of this Commission, dated March 30, 1915 and September 16, 1919, be increased by the elimination of the 8 per cent. specified in said last mentioned order, and by the addition after such elimination of 20 per cent. to all of the rates and charges, for exchange telephone service and facilities, determined and fixed by said order of March 30, 1915, which were reduced 8 per cent. by the said order of September 16, 1919.
>
> "PROVIDED, however, that this consent shall not be effective until said New York Telephone Company shall file with this Commission a bond or undertaking, with the American Telephone & Telegraph Company as surety, approved as to form and manner of execution by

this Commission, providing for the repayment to each and every subscriber in the city of New York, upon the final determination of this proceeding by this Commission, or by the Courts in the event that this proceeding is judicially reviewed, of any amounts paid by said subscribers, from and after April 1, 1921, in excess of the rates or charges which may be fixed upon in such final determination as reasonable rates or charges for the service furnished to such subscribers, with interest on such excess amounts at a rate of 6 per cent. per annum from the respective date or dates of payment thereby to the company, to the date on which such rates and charges are fixed at a less amount than herein provided for.

"Upon compliance with said condition said company may file upon five days notice a tariff in accordance with the terms of this order."

NOW, THEREFORE, the NEW YORK TELEPHONE COMPANY, a corporation of the State of New York, having its principal office at Number 15 Dey Street in the Borough of Manhattan, City, County and State of New York, and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, a corporation of the State of New York, having its principal office at Number 195 Broadway in the Borough of Manhattan, City, County and State of New York, and owner of a majority of the capital stock of said NEW YORK TELEPHONE COMPANY, do hereby jointly and severally undertake, covenant and agree with said Public Service Commission for the Second District of the State of New York, pursuant to the provisions of the above order, to repay to each of the subscribers of said NEW YORK TELEPHONE COMPANY in the City of New York, within ninety (90) days after the service of a final order or determination in the proceeding entitled *"In the Matter of the Application of the* NEW YORK TELEPHONE COMPANY *for the*

Consent of the Commission to the establishment of a New Schedule of Rates for Telephone Service in the City of New York—Case No. 7720", by said Commission or within said time after final determination by the courts, in the event that said proceeding is judicially reviewed, all amounts paid by each such subscriber from and after the first (1st) day of April, One Thousand Nine Hundred Twenty-one (1921), in excess of the rates or charges which may be fixed in such final determination as reasonable rates or charges for the service furnished to each such subscriber, with interest on such excess at the rate of six per cent. (6%) per annum from the respective date or dates of payment thereby to the NEW YORK TELEPHONE COMPANY to the date of repayment thereof in accordance with the terms of said order, such repayment to be made by mailing to each of such subscribers or customers at his last known address a check for the amount due, in a postpaid, sealed envelope, payable to the order of each such subscriber; said check shall be drawn upon some incorporated banking institution located in the City of New York against funds which shall have been deposited therein by the NEW YORK TELEPHONE COMPANY, and which said deposit shall be kept good for not less than one (1) year after such mailing.

It is further COVENANTED and AGREED that this undertaking shall be enforceable *pro tanto* by any of such subscribers to the extent of any sum or sums which shall become payable as aforesaid, and that this undertaking shall also be enforceable by the Public Service Commission for the Second District of the State of New York in behalf of any or all of such subscribers either in one or more actions. PROVIDED, HOWEVER, that recovery by a sub-

scriber or by the Public Service Commission for the Second District of the State of New York on his behalf shall be a bar and defense to other or further action in respect of the claim of such subscriber hereunder.

IN WITNESS WHEREOF the corporations above-named have hereunto signed their respective corporate names and affixed their respective seals by their respective officers thereunto duly authorized this *21st* day of MARCH in the year One Thousand Nine Hundred Twenty-one (1921).

Signed, Sealed and Delivered
In the Presence of:

NEW YORK TELEPHONE COMPANY
By: H. F. THURBER
President.

Attest:

[SEAL] J. N. FERRY
Asst. Secty.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
By: H. F. THURBER
President.

Attest:

[SEAL] A. A. MARSTERS
Secretary.

Exhibit 4.

WHEREAS the PUBLIC SERVICE COMMISSION, STATE OF NEW YORK, in a proceeding entitled *"Petition (or Complaint) of* NEW YORK TELEPHONE COMPANY *in Respect to Increasing Rates, Charges, Tolls and Rentals to be charged by it for Telephone Service in New York City (Case No. 7720)"*, under and by virtue of the authority conferred upon it by the Public Service Commission Law, has issued an order dated the sixteenth (16th) day of June, One Thousand Nine Hundred Twenty-one (1921), containing the following provisions:

> "NOW, therefore, upon the terms, conditions and safeguards hereinafter stated in this order, it is
>
> "ORDERED: That the aforesaid order made and filed herein by the Public Service Commission, Second District, on the 17th day of March, 1921, be modified and that, pending the further continuation of this proceeding and without affecting the final determination thereof this Commission does hereby consent and authorizes that, from and after July 1, 1921, and until its further order in the premises, the rates of the said New York Telephone Company for exchange telephone service in the City of New York, shall be temporarily determined by the elimination of the eight per cent (8%) deduction specified in the aforesaid order of the Public Service Commission, Second District, dated September 16, 1919, and by the addition, after such elimination, of ten per cent (10%) only, instead of twenty per cent (20%) as heretofore ordered on March 17, 1921, to the rates and charges for exchange telephone service and facilities determined and fixed by the aforesaid order of the Public Service Commission, Second District, dated March

30, 1915; without prejudice however, to the conditions and requirements set forth in the aforesaid order of March 17, 1921, as to the bond of the said New York Telephone Company and its surety, the American Telephone and Telegraph Company, and without prejudice to any obligations under said bond now in force to secure the repayment, with interest at six per cent (6%) to subscribers in the City of New York, of any amounts paid by said subscribers from and after April 1, 1921, under the aforesaid order of March 17, 1921; and upon condition that the New York Telephone Company shall repay to each and every subscriber, all sums paid for service from and after June 30, 1921, in excess of the rate or charges which may be fixed by a final determination herein by the Commission, of the rates or charges to be demanded, exacted or collected for service to any such subscriber; and

"IT IS FURTHER ORDERED: That the said New York Telephone Company file with this Commission a bond or undertaking with the American Telephone and Telegraph Company as surety, approved as to form and manner of execution by this Commission, providing for the repayment to each and every subscriber of all sums paid for service from and after June 30, 1921, in excess of the rates or charges which may be fixed by a final determination herein by this Commission of the rates or charges to be demanded, exacted or collected, by the said New York Telephone Company for service to any such subscriber."

NOW, THEREFORE, the NEW YORK TELEPHONE COMPANY, a corporation of the State of New York, having its principal office at Number 15 Dey Street in the Borough of Manhattan, City, County and State of New York, and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, a corporation of the State

of New York, having its principal office at Number 195 Broadway, Borough of Manhattan, City, County and State of New York, and owner of a majority of the capital stock of said NEW YORK TELEPHONE COMPANY, do hereby jointly and severally *undertake, covenant* and *agree* with said Public Service Commission, State of New York, pursuant to the provisions of the above order to repay to each and every subscriber of said NEW YORK TELEPHONE COMPANY in the City of New York, within ninety (90) days after the service of a final order or determination in the proceeding entitled *"Petition (or Complaint) of* NEW YORK TELEPHONE COMPANY *in Respect to Increasing Rates, Charges, Tolls and Rentals to be charged by it for Telephone Service in New York City (Case No. 7720)"*, by said Commission, all sums paid for service from and after June 30, 1921, in excess of the rates or charges which may be fixed by a final determination in said proceeding as the maximum rates or charges to be demanded, exacted or collected by said NEW YORK TELEPHONE COMPANY for service furnished to any such subscriber, with interest on such excess at the rate of six per cent (6%) per annum from the respective date or dates of payment therefor to the NEW YORK TELEPHONE COMPANY to the date of repayment thereof in accordance with the terms of said order, such repayment to be made by mailing to each of such subscribers at his last known address a check for the amount due, in a postpaid, sealed envelope, payable to the order of each such subscriber; said check shall be drawn upon some incorporated banking institution located in the City of New York against funds which shall have been deposited therein by the NEW YORK TELEPHONE COMPANY and which

said deposit shall be kept good for not less than one (1) year after such mailing.

IT IS FURTHER COVENANTED AND AGREED that this undertaking shall be enforceable *pro tanto* by any of such subscribers to the extent of any sum or sums which shall become payable as aforesaid, and that this undertaking shall also be enforceable by the PUBLIC SERVICE COMMISSION, STATE OF NEW YORK, in behalf of any or all of such subscribers either in one or more actions. PROVIDED, HOWEVER, that recovery by a subscriber or by the PUBLIC SERVICE COMMISSION, STATE OF NEW YORK, on his behalf shall be a bar and defense to other or further action in respect of the claim of such subscriber hereunder.

IT IS FURTHER COVENANTED AND AGREED that there is no intention to create a double liability for the repayment of sums, if any, as shall be paid by subscribers for service from and after June 30, 1921, in excess of the maximum rates or charges which may be fixed in a final determination in the proceeding hereinabove referred to, and that this UNDERTAKING shall not extend to or cover the repayment of such excess amounts, if any, paid by subscribers for service from and after June 30, 1921, which shall have been covered by an undertaking dated March 21, 1921, and filed with the Public Service Commission, Second District, State of New York, on March 22, 1921, in pursuance of an order of that Commission dated March 17, 1921, and that this UNDERTAKING shall extend to and cover the repayment of any and all such excess sums paid by subscribers for service from and after June 30, 1921, not covered by said undertaking dated March 21, 1921.

IN WITNESS WHEREOF the corporations above-named have caused their respective corporate seals to be hereunto affixed and these presents to be signed by their respective duly authorized officers this *First* (*1st*) day of JULY in the year One Thousand Nine Hundred Twenty-one (1921).

Signed, Sealed and Delivered
In the Presence of

NEW YORK TELEPHONE COMPANY
By J. A. STEWART
First Vice President and
General Manager.

[SEAL]

Attest
W. HOPPINS
Secretary

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
By H. B. THAYER
President

[SEAL]
C. M. B.

Attest
A. A. MARSTERS
Secretary

FILED
JAN 15 1923
WM. R. STANSBURY
Clerk

Supreme Court of the United States,

OCTOBER TERM, 1922.

NO. 848.

WILLIAM A. PRENDERGAST, ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION, ET AL.,

Appellants,

against

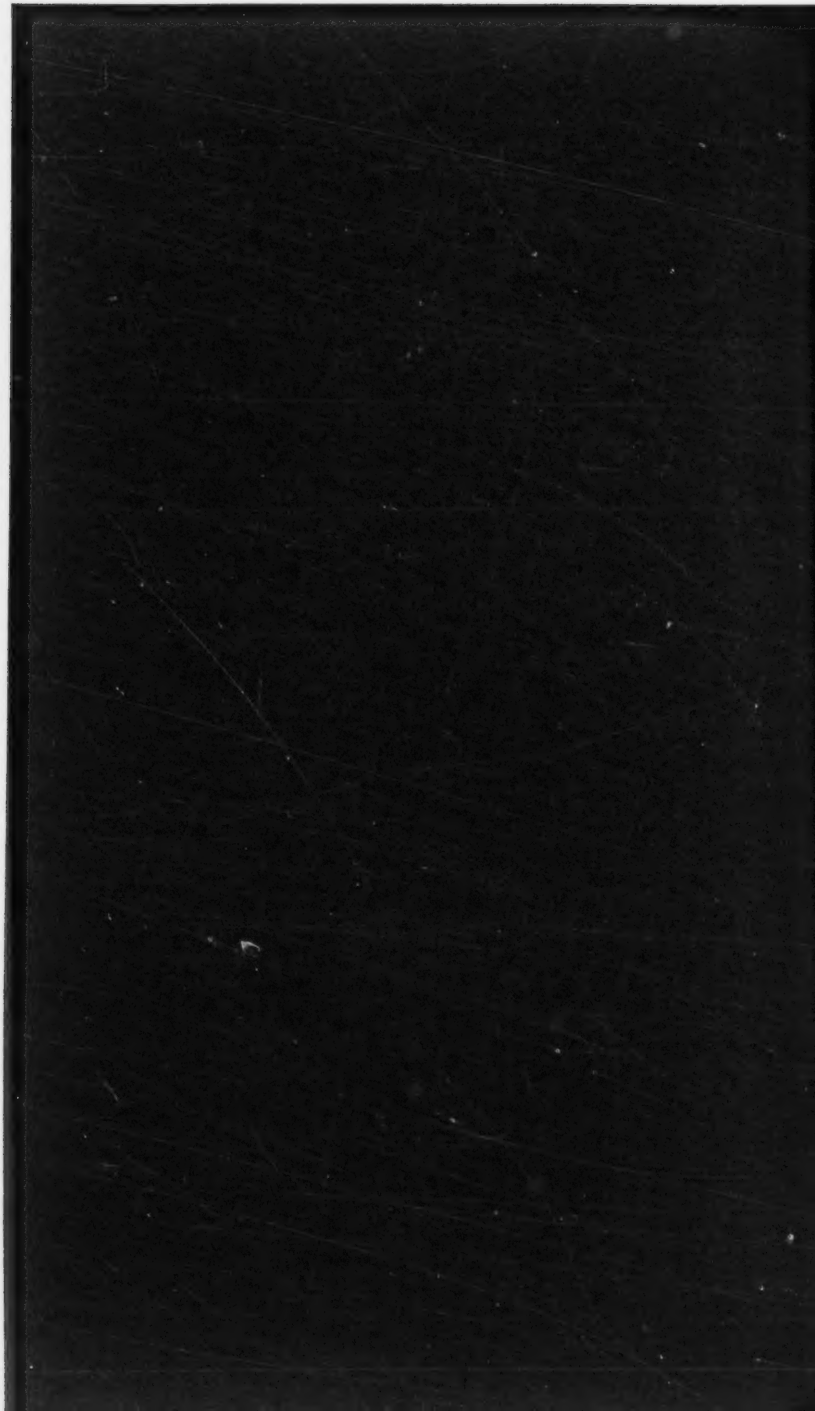
NEW YORK TELEPHONE COMPANY,

Appellee.

AFFIDAVIT IN OPPOSITION TO MOTION OF THE CITY OF NEW YORK FOR LEAVE TO FILE A BRIEF AS AMICUS CURIÆ.

CHARLES T. RUSSELL,
STETSON, JENNINGS & RUSSELL,
Solicitors for Appellee.

The Evening Post Job Printing Office, Inc., 20 Pine St., New York, N. Y.



Supreme Court of the United States,

OCTOBER TERM, 1922.

WILLIAM A. PRENDERGAST *et al.*, constituting the Public Service Commission *et al.*, Appellants, AGAINST NEW YORK TELEPHONE COMPANY, Appellee.	Calendar No. 542.

STATE OF NEW YORK,
County of New York,
Southern District of New York, } ss.:

CHARLES T. RUSSELL, being duly sworn, says: I am one of the solicitors for the appellee in the above suit.

The affidavit and notice of motion of The City of New York for leave to file a brief herein as *amicus curiæ*, returnable on January 15, 1923, were served upon me on Friday, January 12, 1923.

The City of New York, as stated in the moving papers, made formal application to intervene as a party defendant in this suit, and said motion was fully argued before the District Court and denied by that court by an order entered on July 29, 1922, from which denial an appeal has been taken to this court (Calendar No. 588, October Term, 1922).

The appellee on December 14, 1922, moved to dismiss the said appeal or affirm, upon the ground

that the said order of denial was discretionary and not appealable, and such motion has been adjourned to February 19, 1923, the day set for the argument of the appeal in this suit (No. 542) and also of the appeal in said No. 588.

This suit involves telephone rates effective throughout the State of New York (including The City of New York) prescribed by orders of the Public Service Commission of the State of New York, and is being defended by the Counsel for such commission pursuant to the authority conferred by the public service commission statute of that state, and is also being defended by the Attorney General on behalf of the people of the state and all the municipalities thereof pursuant to a special act of the Legislature of the State of New York, being chapter 15 of the Laws of 1922 of said state.

The City of New York has no interest in the controversy separate and distinct from the interests that are being looked after and protected by the solicitors for the other appellants. It appears from the allegations in the moving affidavit that The City of New York has already collaborated with the Attorney General and Counsel for the Public Service Commission in furnishing proof prepared by the City's experts and there does not appear to be any reason why it should not further collaborate in the preparation of a brief. On the other hand, there seems no valid reason why this appellee should be required to answer two separate and distinct briefs concerning the same subject matter.

This attempt by the city to inject itself into this proceeding in the guise of *amicus curiæ* is an effort to obtain by indirection what has been denied to it already upon a direct application, and is taken in the face of what seems to be the well settled

law of the State of New York that a municipality has no authority to use the public funds contributed by all of its citizens in the interest of a certain class, such as telephone users, and that a municipality is not the champion of any portion of its public.

City v. *Citizens Water Supply Co.*, 199 App. Div. 169.

Morrell v. *Brooklyn Borough Gas Co.*, 231 N. Y. 405;

City of Yonkers v. *Federal Refining Co.*, 136 App. Div. 701; affd. 207 N. Y. 724;

CHAS. T. RUSSELL

Sworn to before me this 13th day of January, 1923

LINCOLN JONES

Notary Public, Kings Co. No. 3

Cert. filed in N. Y. Co. No. 50

Kings Co. Register No. 4004

N. Y. Co. Register No. 4045

FILED
MAR 2 1923
WM. R. STANSBU
CLER

Supreme Court of the United States

OCTOBER TERM, 1922

No. 542

WILLIAM A. PRENDERGAST, et al., constituting the Public Service Commission of the State of New York, et al., *Appellants*,

against

NEW YORK TELEPHONE COMPANY, a Corporation, *Appellee*.

MEMORANDUM AND AFFIDAVIT IN OPPOSITION TO DISMISS OR AFFIRM

CARL SHERMAN,
Attorney-General of the State of New York,
Capitol, Albany, N. Y.

LEDYARD P. HALE,
Solicitor for Public Service Commission and William A. Prendergast, et al., members thereof, and Counsel thereto,
91 State Street, Albany, N. Y.

WILBER W. CHAMBERS,
Counsel for the Attorney-General of the State of New York.

SIMON FLEISCHMANN,
MARTIN CLARK,
Counsel for Public Service Commission,
603 D. S. Morgan Bldg.,
Buffalo, N. Y.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.
No. 542.

WILLIAM A. PRENDERGAST, et al., Constituting the Public Service Commission of the State of New York, et al.,
Appellants,
against
NEW YORK TELEPHONE COMPANY, a Corporation,
Appellee.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Appellee has made a motion returnable before this court on March 5, 1923, to dismiss the above appeal or affirm the order appealed from. The appeal was argued on the 21st day of February, 1923.

The motion is based principally on the fact that the appellant Public Service Commission of

the State of New York, on January 25, 1923, entered final orders in the investigation pending before it, as to rates and regulations of the New York Telephone Company, thereby establishing a complete schedule of permanent telephone rates in New York State. Appellee contends that because the annual revenue from the schedule so established will yield more than the temporary rates the Commission has vindicated the court below.

We have already argued in our reply brief filed with this court on the 19th day of February, 1923, that the appeal be determined upon the record which was before the court below in order that the validity or invalidity of its ruling shall be authoritatively determined.

Assuming the permanent rates established by order of the Commission on January 25, 1923, yielded a higher return than the temporary rates fixed on March 3, 1922, to take effect April 1, 1922, it does not follow that the temporary rates fixed for an earlier period were confiscatory.

Cumberland Tel. Co. v. *Louisiana P. S. Co.*, 283 Fed. Rep. 215.

Aside and apart from this contention, we submit herewith the affidavit of William A. Prendergast, Chairman of the Public Service Commission, which we believe will show that the temporary rates were in no sense confiscatory, and that the court below was not warranted in granting the temporary injunction.

We respectfully submit the motion should be denied and the appeal already argued decided on the merits.

Dated, Albany, N. Y., February 27, 1923.

WILBER W. CHAMBERS,
Solicitor for Appellant,
Carl Sherman,
Attorney-General,
of the State of New York,
Capitol, Albany, N. Y.

LEDYARD P. HALE,
Solicitor for Appellants,
Public Service Commission, and
William A. Prendergast, et al., 91 State St.,
Albany, N. Y.

SIMON FLEISCHMANN,
Counsel for Appellant,
Public Service Commission,
603 D. S. Morgan Bldg.,
Buffalo, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 542.

WILLIAM A. PRENDERGAST, et al., Constituting the Public Service Commission of the State of New York, et al.,
Appellants,
against
NEW YORK TELEPHONE COMPANY, a Corporation,
Appellee.

AFFIDAVIT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF ALBANY,
CITY OF ALBANY, } *ss.:*

William A. Prendergast, being duly sworn, deposes and says:

I am a member and Chairman of the Public Service Commission of the State of New York, one of the appellants herein. I have read the motion papers filed and served by the appellee to dismiss the appeal herein or to affirm the interlocutory injunction order, upon the ground that the final order of the Commission of Janu-

ary 25, 1923, will give to appellee an increased revenue over the amount that would be realized under the rates prescribed by the temporary orders of March 3, 1922, from which, the appellee argues, that it was right, upon the merits of the controversy, arising on the granting of the interlocutory injunction, and that therefore the said injunction was properly granted and that there was no error in the order of the court below in granting the same.

While I am advised by counsel for the Commission, and verily believe, that the appeal herein should be determined upon the pleadings, affidavits and papers alone, which were before the court below, I deem it proper on behalf of the Commission, to call the attention of this court to certain facts and considerations which the Commission respectfully claims will show, as we believe and the record on appeal before this court likewise shows, that the rates fixed by the temporary orders were, in no fair sense, confiscatory, and that the court below was not warranted in granting the interlocutory injunction.

In the first place, the Commission with the evidence before it, at the time of making the temporary rate orders, exercised its best judgment, with due regard and consideration for the rights of the Telephone Company, in fixing the temporary rates, which the Telephone Company, in its Bill of Complaint, concedes would have yielded to it, a profit of 2.56 per cent on the cost of its property and nearly 2 per cent upon its value. The Commission believed, and still believes, that, with a proper reduction in the very

large depreciation reserves, which at the time of the making of the temporary rate orders amounted to nearly $70,000,000, or more than 30 per cent of its fixed capital, aside from a surplus representing undivided profits of over $36,000,000, the actual return to the Company would have been much larger than the conceded return above specified, aside from other proper readjustments, which it appeared to the Commission, should then be made, and which would further have increased the percentage of return to the Company. It also appeared and remains a fact, that the dividend history of the Telephone Company during the past twenty-five years showed an average annual dividend return of 8.17 per cent. It is also true, as stated in the memorandum opinion of the Commission made with the orders fixing temporary rates, " the Company has been generously treated in the matter of rates." (Record on Appeal, pp. 122–124.)

The history of the modification of telephone rates by the Commission in recent years likewise confirms this contention, as it appears from the Record on Appeal that in March, 1921, the Commission in the City case made a temporary order eliminating a reduction of 8 per cent, theretofore directed, and after such elimination, increased the rates by 20 per cent, thus making an increase of over 28 per cent over existing rates at that time, which it was expected would yield approximately $11,000,000 of additional revenue. (Record, pp. 23–24.) In June, 1921, a further temporary order was made reducing the 20 per cent surcharge heretofore allowed by one-half, which was accepted by the Company, and still left the

reduced rates 18 per cent in excess of the original rates. These rates continued until the orders on appeal of March 3, 1922, were made, which effected a reduction of about $2,800,000 for the entire State, the enforcement of which has been enjoined by the injunction order of the court below now before this court for reconsideration.

The Commission after completing its investigation, has shown its desire to be fair and considerate of the rights of the Telephone Company, by prescribing rates in its final order of January 25, 1923, which, while somewhat higher than the temporary rates of 1922, in the City of New York are somewhat lower for the remainder of the State, but, on the whole, will yield to the Company an increase in its revenues and percentage of profits. The Commission in reaching this result has cut down to what it believes a figure entirely fair to the Company, the valuation claimed therefor by the Company and its experts and also reduced its operating expenses by directing the annual expense of depreciation be materially reduced; but on the other hand, has allowed to the Company increases in some items of expense and in other particulars which it believes were fair to the Company, as well as to the public. Broadly speaking, it has been the purpose of the Commission to prescribe rates which would yield to the Company 7 per cent upon the fair value of its property and after recognizing the accumulated depreciation reserves. This percentage of net return anticipated as near as can be, is, as the Commission verily believes, a fair and adequate return, especially to a Telephone Company with its practically secured mo-

nopoly and reasonable certainty of definitely increasing business activity, and even a lesser return, under these circumstances, would, as the Commission likewise believes, not be regarded as confiscatory.

For the reasons above stated and others, the Commission respectfully urges that the temporary rates were not, in fact, or in law, confiscatory, nor can they properly be so regarded. This is especially true, because these rates were temporary and intended to prevail only until permanent rates had been determined upon the completion of the investigation then in progress, and in view of the provision of section 97 of the Public Service Commission Law of the State of New York, which provides:

> "The Commission shall, with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, charges and rentals to be thereafter observed * * *"

While the Commission in fixing permanent rates in January, 1923, by its final order, upon a basis intended to allow to the company a 7 per cent return, did not thereby attempt to make up to the company the amount of reduced revenue resulting from the rates fixed by the temporary orders during their continuance, it nevertheless remains the fact that the permanent allowance

of rates on a 7 per cent basis should yield to the company a return, which will result in the temporary rates followed by the permanent rates, and considered together, yielding to the company that " reasonable average return upon the value of the property actually used in the public service " contemplated by the statute, including the period covered by the temporary rates.

The order of the Commission contemplated that the Company could apply for a rehearing upon the rates fixed by the temporary orders, and for a modification of the classifications made by said temporary orders; and the Company could have applied under the provisions of the Public Service Commission Law for a rehearing.

But the company did not apply for any rehearing or modification of the rates fixed by the temporary orders at any time either under the express provisions of the orders themselves, or under the statute applicable thereto, but before the orders themselves became effective and over two weeks before the time set by the Commission in its orders for considering an application or a modification of the orders, began the suit in equity in the Federal Court, to restrain the operation of said orders, and forthwith obtained a temporary restraining order, so that, the temporary rates have never been put in operation or become effective.

We, therefore, respectfully but earnestly submit and ask, that the motion to dismiss the appeal or to affirm the interlocutory judgment, without consideration of its merits, be denied, and the appeal considered and determined upon

its merits and upon the record before the court below and before this court relating thereto and upon which the court below acted and could alone have based its determination.

WILLIAM A. PRENDERGAST.

Sworn to before me this 28th
day of February, 1923,

JOHN J. FARLEY,
Notary Public,
In and for the County of
Albany, State of New York.

Office Supreme Court, U.
FILED
FEB 19 1923
WM. R. STANSBUR
CLER

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 542.

WILLIAM A. PRENDERGAST, et al., constituting the Public Service Commission, et al.,
Appellants,

against

NEW YORK TELEPHONE COMPANY,
Appellee.

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE, BY PERMISSION

GEORGE P. NICHOLSON,
Corporation Counsel,
The City of New York,
Municipal Building, New York.

M. MALDWIN FERTIG,
HARRY HERTZOFF,
of Counsel.

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Supreme Court of the United States

October Term 1922

(No. 542)

WILLIAM A. PRENDERGAST, *et al.*, constituting the Public Service Commission of the State of New York, *et al.*,

Appellants,

against

NEW YORK TELEPHONE COMPANY,

Appellee.

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE

Statement.

This is an appeal from an injunction order dated June 12, 1922 issued out of the United States District Court for the Southern District of New York by a statutory court organized under the provisions of Section 266 of the Judicial Code enjoining and restraining the appellants, pending the trial and determination of this cause, from attempting to compel the appellee to observe or put in force the rates for telephone service subscribed by the *two orders* made by the Public Service Commission of the State of New York on March 3, 1922 or *either* of said orders.

The two orders thus enjoined were (1) the order made in case No. 7720 (Exhibit E, p. 27) reducing rates for local exchange telephone service in The City of New York by five per cent and (2) the order in case No. 377 (Exhibit F, p. 29), ordering a reduction of seven per cent for telephone rates in the State of New York. The former order was made in what is known and may here be designated as the City case while the latter was made in the so-called State-wide case. The State-wide order, it should be noted, sets forth rates for ten groups of territories and then follows the eleventh group for The City of New York in the following language:

> "Group XI. New York City (comprising the boroughs of Manhattan, The Bronx, Brooklyn, Queens and Richmond).
>
> The rates for this group shall be as prescribed in the order of March 3, 1922, in case No. 7720 upon terms and conditions as therein set forth."

The enforcement of both orders was restrained upon the conclusion stated in the opinion of the Court (page 185) as follows:

> "We do not undertake to make a rate, but we are of opinion that such a return as is hereinabove indicated, admitting arguendo all the foregoing contentions of the defendants (except the matter of Federal income tax) is not and cannot possibly be a fair return for any business like the telephone business in or near the State *or The City of New York* at the present time." (Italics ours.)

The City and State-wide cases differ in origin, duration, purpose and results.

The City case was instituted upon application

of the New York Telephone Company on or about August 25, 1920, by petition to the Commission for leave to put into effect increased rates from and after October 1, 1920 (p. 23). The company requested consent to put into effect schedules which would increase its annual revenues by some $16,000,000 (p. 23).

Commencing October, 1920, various hearings were held and on March 17, 1921, the Commission made a temporary order effective April 1, 1921, eliminating the discount of eight per cent theretofore allowed and after such elimination, increasing telephone rates by twenty per cent. Roughly this was an increase of twenty-nine per cent over existing rates and it was expected to yield approximately $11,000,000 in revenue (pp. 22, 23, 24). These rates went into effect April 1, 1921 (p. 24). On the 16th day of June, 1921, a second temporary order was made reducing rates by adding ten per cent instead of twenty per cent as theretofore ordered on March 17, 1921. The third order in the City case (p. 27), the subject of appeal herein, was made on March 3, 1922.

The State-wide case was instituted upon motion of the Commission by an order dated November 10, 1921, providing for a hearing on the 29th of November, 1921 (p. 105). The order of the Commission of March 3, 1922, in the State-wide case (p. 29) enjoined herein was the only order made in the State-wide case.

All of the orders of the Public Service Commission in the State-wide and City cases were temporary (Exhibits B, C, D, E, F, pp. 20, 22, 25, 27, 29). The reasons for these orders were stated in the orders themselves or in memorandum accompanying them (p. 122).

The City of New York sought to intervene as a party herein but leave was denied. Appeal from said order is pending before this Court in case No. 588, October Term, 1922. Leave to file this brief as *amicus curiae* herein was granted on the 15th day of January, 1923. The City of New York was not permitted to appear as a party below but the affidavits of its experts were submitted through the Public Service Commission (pp. 125, 129, 131).

Twenty-six days after the making of the orders of the Commission enjoined herein, to wit, the 29th day of March, 1922, and before the day said orders went into effect, this suit in equity was instituted by the appellee (p. 92). By order of the District Court, March 29, 1922, appellants were enjoined and restrained until the further order of the court from taking any steps to enforce the Commission's orders of March 3, 1922, and setting the hearing for preliminary injunction on April 8, 1922. The injunction order was issued on the 12th day of June, 1922.

POINT I.

Until the legislative act of rate making is completed or exhausted particularly (1) where the rate fixing body is authorized to suspend the enforcement of its order pending final determination upon rehearing and (2) where opportunity for application for rehearing was had prior to the date of going into effect of such order, parties alleged to be injured may not invoke the courts of the United States.

The decisions amply sustain the proposition that the Federal Courts will not take jurisdiction of cases alleging confiscation in rate cases, until the legislative process of rate making is fully exhausted. In *Palermo Land & Water Co.* v. *Railroad Commission of California, et al.*, 227 Fed. Rep., 708, the California Public Utilities Act gave the State Railroad Commission power to fix rates to be charged by public utilities and provided that after any order fixing rates any party affected may apply to the Commission for a rehearing. The law further provided that no cause of action arising out of such order would accrue in any court unless application for rehearing shall have been made before the time for the order to become effective. It also empowered the Commission to suspend the order pending the rehearing if necessary. *Held* that a Federal Court will not entertain a suit to enjoin enforcement of such an order, on the ground that it violates constitutional rights, until the complainant had exhausted the legislative

remedy provided by the State upon an application for a rehearing. The court at page 709 said:

> "This is rested, not only upon well-settled principles of equity jurisprudence, but upon the dictates of comity as well; that where a state has provided, as is its right, a complete legislative scheme for the fixing of rates, those rights should not be interfered with, nor the proceedings of the state arrested, *until the last legislative step has been taken,* and it may definitely be seen whether the act of the state as a finalty ignores or infringes upon the rights of the complaining party; that until such time it cannot be said that the state authorities have violated those rights, or refused to observe them, *and until that stage is reached* it is not within the province of the Federal Courts to interfere. * * *
>
> * * * It can with no more propriety be said here that the proceedings of the State Commission were complete without an opportunity to revise its order on petition for rehearing than that the order of the Virginia Commission was final without the exercise of the revisory power of the Court of Appeals. (The court here referring to *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S., 210, referred to at page 709).
>
> The right and opportunity to correct any injustice or imperfection in its order before having it assailed is as imperative here as was the right of the Virginia Commission to have its order reviewed by its Court of last resort. *It is the last legislative step* and without it its action is incomplete. Nor are the cases to be distinguished by the fact that there the appeal was to a separate tribunal while here the tribunal is the same. * * * *It was still but a part of a legislative scheme to accomplish legislative ends.* * * * Being but a legislative act, it is as competent for the Com-

> mission to review and correct its order as it would be with that function committed to any other body, and it should be afforded that opportunity. It is not within the power of the State to defeat the right of a party to have such an order judicially reviewed *after it has reached a justiciable stage.* (Italics ours).

In the *Prentis* case, *supra,* the Court said, at page 228;

> "Litigation cannot arise until the moment of legislation is passed."

At this date there can be no question that rate regulation by a Commission is legislative in character as if exercised by the Legislature itself. In *Louisville & Nashville Railroad Company* v. *Garrett,* 231 U. S., 298, at page 318, the Court said:

> "The order of the Railroad Commission in fixing rates was a legislative act, under its delegated power. It had 'the same force as if made by the Legislature.' *Grand Trunk Railroad* v. *Indiana Railroad Commission,* 221 U. S., 400, 403."

A limitation of the rule requiring Federal Courts to abstain from interfering until the legislative process is complete appears to have been laid down in *Love* v. *Atchison, T. & S. F. Ry. Co.,* 185 Fed. Rep., 321. The *Love* case was distinguished from the *Prentis* case because the rates were already in operation, the Court saying at page 326:

> "The provision fixing the maximum fare and these orders for many months had been and were continually taking, and, unless their enforcement was stayed, would continue to take, the properties of the companies without just compensation. The Supreme Court had held in *Prentis* v. *Atlantic Coast Line,* 211 U. S., 210, (other citations) *that where future*

proposed rates were made, but were not and probably would not be in operation until after allowable appeals from the order prescribing them could be taken and decided by the Supreme Court of Appeals of Virginia in the exercise of its legislative function of rate making, the more courteous course was for the companies affected to take the appeals and delay their applications to the Federal Courts for relief until those appeals were decided or the rate making process was otherwise concluded. But it never had held that citizens whose property had been and was continually being taken without just compensation by the penalties of tentative confiscatory rates during the continuous process of rate making, were thereby deprived of immediate and plenary relief in the national courts from such a patent violation of the 14th Amendment to the Constitution. Such a holding would render citizens remediless as long as the process of rate making should be continued, and that process might be continued indefinitely, nay forever."

In the case at bar the order was issued March 3, 1922, and to take effect April 1, 1922. Under Section 22 of the Public Service Commissions Law, the Commission had the authority to allow a rehearing and to stay or suspend the enforcement of the orders of March 3, 1922, upon application for a rehearing. Such an application for rehearing could be made within a reasonable time after the order is made (*Buffalo* v. *Buffalo Gas Co.,* 143 N. Y. Supp., 716).

Under the law of the State of New York no order of the Commission can be reviewed judicially until an application for a rehearing is made. In other words, the jurisdiction of the Courts to review judicially any rate may not be invoked un-

til the process of rate making has been completed by the Commission. Section 1286 of the Civil Practice Act provides as follows:

> "Sec. 1286. *Limitation upon granting certiorari orders.* Except as otherwise expressly prescribed by statute, the *certiorari* order cannot be granted in either of the following cases:
>
> 3. Where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application; unless the determination to be reviewed was made upon a rehearing or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed."

In *Belt Line Railroad Corporation* v. *Newton, Attorney General, et al.*, 273 Fed. Rep., 272, in a *per curian* opinion (Judges HOUGH, LEARNED HAND and MAYER, presiding,) the Court held:

> " 'When the legislative remedy for the creation or maintenance of a confiscatory rate is exhausted, the parties injured may choose their forum of review and assert their rights (as has here been done) in the Courts of the United States.' (Citing *Home Telephone Co.*, v. *Los Angeles*, 211 U. S., 278; *Prentis* v. *Atlantic Coast Line*, 211 U. S., 228; and *Bacon* v. *Rutland Railroad Co.*, 232 U. S., 134)."

In the *Belt Line* case the company made an application for rehearing, but the Commission failed to make its decision within the thirty days after submission of the case upon rehearing as required by Section 22 of the Public Service Commissions Law. It was for the reason that the plaintiff exhausted every remedy available to it under the machinery provided for rate making by the State of New York that the Court took jurisdiction.

The case of *Chicago Railways Company* v. *Illinois Commerce Commission*, 277 Fed. Rep., 970, was an instance where injunction was issued after the making of an order by the Illinois Commerce Commission, although the statute of that state provided for an opportunity for rehearing. In the Chicago case, however, there was no provision of law as is provided in this State in the Civil Practice Act, *supra*, making an application for a rehearing obligatory before review of the determination of the Commission could be had in the courts of this State. Further as is specifically pointed out in the decision the order of the Illinois Commission went into effect *immediately* after its passage, the Court saying at page 974:

> "The order of the Ilfinois Commerce Commission was a complete exercise of the legislative power of the State, *and was in force immediately after its passage*, notwithstanding a motion to reconsider might have been urged and entertained. *If the State of Illinois, vesting the power to regulate rates in the Commerce Commission, had provided that the orders of the Commission should not be put into effect until after a certain time, within which an application for a rehearing could be made, another question will be involved;* but the statute of Illinois did not so provide, and, the granting or denying of a petition for rehearing being wholly within the discretion of the Commission the legislative act was complete upon the entry of the order."

The decisions of the Courts of the State of New York are clearly to the effect that no review of an order of the Commission will be entertained until every available remedy is exhausted before the Commission (*City of New York* v. *New York Edison Co.*, 196 A. D. 644).

The granting of injunctive relief in equity in rate cases and particularly in temporary or intermediate orders "is a very serious and grave matter and all doubts should be resolved against the party seeking such relief." Such procedure is an effective check upon the exercise of regulatory powers of State Commissions and tends completely to defeat the purposes for which they were created. It places the duty and responsibility of passing upon all the technical and intricate problems involved in rate regulation, which it was intended by the creation of State regulatory bodies to place into the hands of expert bodies.

> *Chicago Railways Co.* v. *Illinois Commerce Commission, supra;*
> *Wisconsin-Minnesota Light & Power Co.* v. *Railroad Commission of Wisconsin,* 267 Fed. Rep., 711, 721, 722.

If a *prima facie* showing, in any case, upon affidavits alleging confiscation, wholly disregarding the record made before the Public Service Commission upon which is based a rate order sought to be enjoined, can constitute ground for the granting of a temporary injunction, state regulation of public utilities, so far as rate fixing is concerned, is for all practical purposes a dead letter. Every order made in any long, tedious and complicated rate hearings before a Commission which does not suit the public utility, can be immediately removed into the Federal Courts upon claim of confiscation; thus not only, for all practical purposes, restraining the Commission from further proceeding in the case *but giving the Federal Courts jurisdiction in the final trial of the injunction suit to try out all the issues of fact and law involved.*

II.

The bill of complaint and moving affidavits are void of any facts to support the contention that the order of the Public Service Commission of March 3, 1922, in Case No. 7720 (Exhibit E) reducing exchange telephone rates in New York City is confiscatory.

It clearly appears from appellee's bill of complaint, exhibits thereto annexed and the moving affidavits, that upon March 3, 1922, the Public Service Commission adopted two separate and distinct orders in different cases then pending before the Public Service Commission:

One (Exhibit E, p. 25) related entirely and exclusively to the City of New York and to the rates for "exchange telephone service and facilities" therein. This order was in Case No. 7720.

The other order (Exhibit F, p. 27) affected rates for telephone service outside of New York City and within the State of New York and service not affected by the rates prescribed in the other order (Exhibit E). Exhibit F was issued in Case No. 377.

The two orders are entirely separate and distinct. Exhibit E might be annulled, repealed or even declared confiscatory without disturbing in any way the validity, force and effect of Exhibit F. Conversely, Exhibit F might be declared confiscatory without disturbing in any way the validity, force or effect of Exhibit E.

Further, upon the making of a final order in *Case No. 7720* (such an order has since been made on Jan. 25, 1923) the action of the Commission were

to be reviewed through a writ of certiorari, the state courts would have before them only the record in that case and would be concerned with a distinct class of service having separate and distinct rates and wholly differentiated from any other service furnished by the New York Telephone Company (pp. 132, 133). The facts relating to Exhibit E would not involve the entire property, revenues or expenses of the New York Telephone Company, or even the data relating to the business of the State of New York.

The differentiation of the City of New York from other territory, reflected in the distinction made in the two orders of March 3, 1922, is not new. At least as early as July 1, 1915, telephone rates in the City of New York were fixed by the Public Service Commission for the Second District irrespective of the charges or service in the remainder of the State. The order becoming effective upon that date (Exhibit A) had nothing whatever to do with service outside of the City of New York; and from that time to the present, Public Service Commissions have recognized this differentiation (p. 133).

It is unnecessary to argue here that such differentiation is not only proper but necessary, and that the question of what are reasonable rates in New York City has nothing whatever to do with reasonableness of rates elsewhere. It may be pointed out, however, that the telephone business in the City of New York considerably exceeds the telephone business in the remainder of the State. Nearly 70 per cent of the telephones in use in the State are located within the City of New York. About 70 per cent of the operating revenues of the New York Tele-

phone Company collected in the State of New York are paid by New York City subscribers. Over 50 per cent of the plant and equipment of the entire company is within the City of New York, and over 55 per cent of the revenues of the entire company are collected in the City of New York (p. 132).

Complainant avers (p. 8) that the order of March 3, 1922, relating entirely to New York City, is confiscatory. The bill of complaint reads: "The orders aforesaid and *each* of them are, therefore, null and void." But nowhere in its bill of complaint or in the exhibits thereto annexed, or in the ten moving affidavits are there alleged facts supporting this averment. Nowhere in these papers does there appear any statement of the revenues, expenditures or net earnings derived in the City of New York from the telephone business affected by said order of March 3, 1922 (Exhibt E). Nowhere in these papers does it appear what is the cost or the value of the property of the New York Telephone Company within the City of New York devoted to the service covered by said order, and there are no allegations whatever to indicate, even in the opinion of complainant, what the probable revenues, expenses or net earnings would be if said order were in effect (pp. 133, 134).

Even if the allegations of complainant were indisputably correct as to the return upon telephone business in the entire State of New York or in the State outside of the City of New York, such allegations would not afford sufficient basis for injunctive relief as to the order set forth as Exhibit E. It must clearly appear that the revenue from the rates prescribed in that order are insufficient

to yield a fair return upon the property used for the specfic class of service covered by the order.

Northern Pacific Railroad Company v. *North Dakota,* 236 U. S., 585; P. U. R. 1915 C, 277;
Vandalia Railroad Company v. *Schnull* 255 U. S., 113.

In view of these facts, it is submitted that, as far as said order (Exhibit E) is concerned, there is not a scintilla of proof in the moving affidavits supporting its alleged confiscatory character.

III.

The court's statement that no computation could reduce the basis for return much below $300,000,000 is erroneous.

In the opinion (pp. 184, 185) the following is stated:

"Nevertheless in respect of plaintiff's property, the Court is bound to recognize as a matter of common knowledge that the present value less depreciation or its replacement cost as depreciated* is at the present moment far greater than the cash expenditures of past years in producing that which now exists (*Lincoln, etc., Co.* v. *Lincoln*, 250 U. S., 256, 267)" (p. 184).

"But in considering what is a fair rate, it is to be observed that no computation can reduce the basis for a return much below $300,000,000.

"That is to say, the cost of reproduction less depreciation is (as above stated) considerably more than that sum; while the cost of reproduction new, less the plaintiff's accumulated re-

* depreciation in original; obviously typographical error.

serve for depreciation and amortization, also amounts to substantially the same $300,000,000" (p. 185).

These quotations, it is submitted, assume the following principles, implied or expressed:

(1) That the present value less depreciation is the same as replacement cost less depreciation.

(2) That present value and replacement cost are interchangeable terms.

These propositions appear to be repugnant to the clearly settled law.

Valuation in rate making is not a simple matter. The difficulty lies in the use of the words "fair value." Fair value in its usual current, economic sense can have no significance when applied to a public utility.

> "A mine, a railway, a parcel of real estate, a factory, each is valued on the basis of its net income * * . In the world of affairs, *all property is valued in terms of its income;* all that brings in an income is a like capital, and all is measured or capitalized on the basis of its income."
>
> 2 *Taussig, Principles of Economics,* 2nd Ed. (1920) 118;
> *Hale, The "Physical Value" Fallacy in Rate Cases* (1921) 30 *Yale Law Journal* 70, 710;
> *Yale Law Journal,* February, 1923, p. 391.

Basing the value of a public utility upon its income is impossible for the reason that the ascertainment of a proper income for a public utility in any given rate case is the very question to be decided.

Nevertheless, though there is no corresponding mental concept for the term "fair value," it is made

the basis for the computation of what shall constitute a proper income.

In *Smyth* v. *Ames,* 169 U. S., 466 at page 546 it was held that

> "In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present *as compared with* the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, are all matters for consideration, and are to be given such weight as may be just and right *in each case.*"

In succeeding cases it has been constantly pointed out that the rate base must be what is called "the fair value of the property," and as to this there must be a reasonable judgment based on a proper consideration of *all* relevant facts.

San Diego Land & Town Co. v. *National City,* 174 U. S., 739 at 757;

San Diego Land & Town Co. v. *Jasper,* 189 U. S., 439, 446;

Wilcox v. *Consolidated Gas Co.,* 212 U. S., 19 at page 41;

Minnesota Rate Cases, 230 U. S., 352 at 434;

Galveston Electric Co. v. *Galveston,* 42 Sup. Ct., 351.

In *Brooklyn Borough Gas Company* v. *Public Service Commission,* 17 State Department Reports (N. Y.) 81, at page 98, is a very illuminating discussion of this matter by former Justice CHARLES E. HUGHES, who acted as Referee in that case.

"While it is important to consider the cost of reproduction in determining the fair value of a plant for rate making purposes, it cannot be said that there is a constitutional right to have the rates of a public service corporation based upon the estimated cost of the reproduction of its property at a particular time regardless of circumstances. To base rates upon a plant valuation simply representing a hypothetical cost of reproduction at a time of abnormally high prices due to exceptional conditions would be manifestly unfair to the public, and likewise to base rates upon an estimated cost of reproduction far lower than the actual *bona fide* and prudent investment because of abnormally low prices would be unfair to the company. * * * But it is a different thing, after cost has been defrayed and the question is as to the compensation to be allowed in excess of cost, to take as the basis for a compensatory return an asserted plant value, far above the actual investment, which is reached merely by expert estimates of a cost of reproduction under abnormal conditions. This would result in allowing a public service corporation to take advantage of a public calamity by increasing its rates above what would be a liberal return not only on actual investment but upon a normal reproduction cost in the view that unless it could make an essentially exorbitant demand upon the public it would be deprived of its property without due process of law. The enforcement of the constitutional guaranty does not require the application of any artificial formula. It has constantly been pointed out that the rate base must be what is called 'the fair value of the property' and that as to this there must be a reasonable judgment based on a proper consideration of all relevant facts."

"* * * * * it would be difficult to find any basis more just than the appraisal carefully made by public authority and based on reproduction cost before the outbreak of the Euro-

pean war, with proper consideration of the actual investments since that time."

No figure in and of itself can fairly represent "fair value." As was said in *Peo. ex. rel. Iroquois Nat. G. Co.* v. *P. S. Comm.*, 194 App. Div. (N Y.) 578, 581:

> "The problem of fixing rates is necessarily difficult. As pointed out, different elements ought to be considered. Original costs, permanent improvements, necessary operating expenses, depreciation for use, present economic conditions as well as other pertinent matters, including the opinions of competent witnesses as to present values, all should receive fair consideration in reaching a conclusion as to the reasonable value of the property involved."

The foregoing opinions seem to indicate that this court has required the consideration of many facts before a conclusion as to fair value could be reached. Consequently there is no justification for the use of the term "reproduction cost" as a synonym of "fair value."

This rule does not designate any respective weights that should be given to the component elements to be considered. This difficulty was recognized by the Court in *Consolidated Gas Co. of New York* v. *Newton* (267 Fed. Rep. 231, at 236) in these words:

> "With deference, it appears to me to be merely an abandonment of any attempt to deal intelligibly with the question to say that cost of reproduction and the original cost are each elements to be considered. *The statement can mean nothing whatever, unless it is accompanied by a constitutive rule, which will establish some standard in the ascertainment of which these may be used.* It would be under-

> standable to say that the two estimates should be averaged, but such a rule could obviously command no support, because it would correspond to no relevant consideration of policy. *Merely to leave the question with a caution that several elements are to be considered is to abandon any effort to solve it.*"

The situation may be likened to a physician's prescription setting forth the various ingredients to be used, but not providing for definite quantities thereof.

However, many Commissions which are devoting their entire time and study to this problem and which have endeavored conscientiously to reach fair conclusions under the rule, have inclined very strongly to the belief that the actual or original cost is the most definite standard, and the fairest for user and investor in either high or low price levels, and that such standard is the most workable for practical purposes.

As was said by Chairman Hill of the New York Public Service Commission in the Sea Cliff and Glen Cove gas rate case quoted in *Re Utica Gas and Electric Company*, P. U. R. 1922A, 146:

> "To prove a present day reconstruction cost, however, is in my opinion quite a different thing from proving a 'value.' Cost is one thing and value is another. A reproduction cost is purely hypothetical as a measure of value. That the constituent elements of the property would today cost more than at some previous date does not establish as a fact that the combined and established property is actually worth more. It may be and may not be. The greatest value of these elements in a successful plant is their combined value as a going property. If the company could show that it could if it so desired secure for its property the al-

leged increased value, even as a whole or by selling piecemeal, or that it is worth more today in the market in any form, then there would be force in its contention that its value has increased and that by leaving the property in the public service a sacrifice of the realizable value is being made which should be the just measure of present value for rate making purposes. But when such is not the case it is difficult to recognize where the claimed enhancement has any existence in fact. If it is not there in any tangible sense, and if it is not capable of realization in any practical way, then I fail to see how it can be said to exist at all."

In *City of Winona* v. *Wisconsin-Minnesota Light & Power Company* (U. S. District Court, Minnesota, First Division) P. U. R. 1922C, 461, at pages 466, 467:

"As I understand the ruling of these cases, it is that the utility company is entitled to have a fair return upon the reasonable value of the property used and useful in rendering the service, and as of the time the service is rendered. This does not mean that the reasonable value is necessarily the same as the cost of reproduction new less depreciation estimated as of the time of the inquiry with additions made for overheads, etc.; nor does it mean that the reasonable value is necessarily the same as the original cost of construction less depreciation with similar conditions; nor does it mean that that cost of reproduction new less depreciation based on average prices for any series of years is necessarily controlling. But it does mean that all of these methods and others may be resorted to as aids in forming a judgment as to what is the present value. That there can be no mathematical certainty in such a judgment goes without saying. Nor does any formula exist which can be used in all cases. The most that can be expected is, quoting the lang-

uage of Justice HUGHES in the Minnesota rate case, 'a reasonable judgment having its basis in a proper consideration of all relevant facts.'"

As above stated many Commissions are heavily leaning towards original cost. A lengthy list could be set forth, affording, we believe, much interest, but for the sake of brevity a few citations are given:

Morris v. *Northwestern Bell Telephone Company* (So. Dakota) P. U. R. 1922D, 769 at page 774;

Re Franklin Light & Power Company (N. H.) P. U. R. 1922A, 506, 514;

Re Page Light Plant (No. Dakota) P. U. R. 1922A, 652, 655;

Barth v. *Hughes & Deiters Electric Co.*, (No. Dakota) P. U. R. 1922A, 740, 747;

Re Molalla Electric Co. (Oregon) P. U. R. 1922C, 811, 814;

Re Telluride Power Company (Utah) P. U. R. 1922B, 168, page 175;

City of Danbury et al., v. *Danbury & Bethel Gas & Electric Light Company* (Conn.) P. U. R. 1921D, 193, pages 205-6-7;

Re Wisconsin Telephone Company (Wis.) P. U. R. 1921E, 171, page 176;

Public Service Commission of Washington v. *Spokane Falls Gas Light Company et al.*, (Wash.), P. U. R. 1921C, 519, page 523;

Re Chesapeake & Potomac Telephone Company (W. V.) P. U. R. 1921B, 97, at page 107;

Re Lewiston Gas Light Company (Maine), P. U. R. 1921A, 561, at page 571;

Roanoke Water Works Company (Va.) P. U. R. 1920C, 745, 748;

Re Gardiner Electric Light and Water Company (Montana) P. U. R. 1920D, 821 at page 823;

Samuel Evans Maires v. *Flatbush Gas Company,* (N. Y.) P. U. R. 1920E, 930, page 940;

Re Capital Traction Company (D. C.) P. U. R. 1919F, 779 at page 801;

Re Farmers Independent Telephone Company (Neb.), P. U. R. 1919D, 769, 770;

Re Indianapolis Water Company (Ind.) P. U. R. 1919A, 448, 467;

Re Bay State Rate Case, (Mass.), P. U. R. 1916F, 221, 233;

Re Cripple Creek Water Company (Col.) P. U. R. 1916C, 788, 800.

Courts have held that original cost is the *principal* element to be considered. Thus in *Bluefield Water Works and Improvement Company* v. *Public Service Commission, et al.* (West Virginia Supreme Court of Appeals Pur. 1922, see 79 at pp. 82-83) the Court said:

> "That the basis of reproduction new less depreciation cannot be adopted with fairness to the utility or to the public, as well illustrated in the case of *Steenerson* v. *Great Northern Railroad Co.,* 69 Minn., 353, 72 N. W. 713. * * * "

> "That the original cost considered in connection with the history and growth of the utility and the value of the services rendered constitute the principal elements to be considered in connection with rate making seems to be supported by nearly all of the authorities."

Likewise in *State P. U. C. ex rel., City of Springfield* v. *Springfield Gas and Electric Company,* the Illinois Supreme Court said: (125 N. E. 891)

"Appellee contends that the only equitable basis for determining value for rate making purposes is the cost or reproduction new, less depreciation. This contention cannot be sustained.

* * * * * * * * * *

It would be equally as unfair to the consumer to fix the rate at a figure which would reduce a reasonable income on a value determined by the cost of reproduction new at a time when cost of construction was abnormally inflated, as it would be unfair to the public utility to compel it to serve the public for a rate that would produce a reasonable income on a value determined by cost of reproduction new at a time when the cost of construction was abnormally low."

IV.

The adjustment for excessive depreciation charges alone, makes an adequate income available to appellee.

A public service corporation should make adequate provisions for depreciation. A sufficient reserve should be accumulated through charges to operating expenses to take care of all accruing depreciation including obsolescense, inadequacy and other causes of property retirements, and when once accumulated, such a reserve should be held inviolable for its purposes, not available directly or indirectly as a basis of additional return to investors.

Here, however, the charges and accumulations for a number of years have been considerably greater than required for all accrued depreciation. This is indicated by the fact that the reserve, in

spite of extensive renewals in recent years, has advanced from $9,311,301.62 in 1909 to $68,042,229.00 as of October 31, 1921 (p. 143). This is an accumulation of over $58,000,000 during twelve years, a period of rapid property expansion with a large proportion of the property new or recently installed.

On the basis of the appellee's affidavit by Jacob S. Wiley, the average cost of the property in 1921 including work in progress and working capital, was $230,269,583 (p. 47). The depreciation reserve as previously stated was $68,042,229.00 as of October 31, 1921 or nearly 30 per cent of the total cost of the property. This is a very high percentage of property installed during the last five years.

Moreover we call the Court's attention to the fact that the above amount of property includes work in progress, working capital, land and other undepreciable capital. If therefore these items were eliminated from the statement of property the percentage of the depreciation reserve would be much higher than 30 per cent.

In line with this view, the Commission in its memorandum accompanying the restraining order of March 3, 1922 (p. 122) stated that a depreciation reserve of 30 per cent or over was sufficient *without further accumulating larger sums for that purpose.*

We submit that in considering whether the temporary rates are confiscatory, the Court should exclude from operating expenses all unnecessary charges for depreciation. For the ten months ended October 31, 1921, there was included in operating expenses a total charge of $9,504,772.33 for depreciation (p. 143). But during this period, there was actually expended only $3,756,241.36 for renewals

and replacement of property (p. 143). Consequently there was an additional accumulation of reserve, above actual replacements and renewals, amounting to $5,748,530.97. This on the basis of a year is equivalent to a further reserve accumulation of $6,900,000. There is no reason why such a rate of accumulation should be continued on top of a 30 per cent reserve; this is particularly true since the rates were fixed on a temporary basis.

In view of these facts, we submit that appellee would be reasonably treated if for the period of the tentative rates it were allowed in operating expenses only the actual cost of renewals and replacements, without any aditional accumulation of reserve. If this adjustment is made, there is returned to net operating income for the year about $6,900,000. This added to the appellee's statement of $8,175,180 (p. 48) would give a net revenue of $15,075,180. From this there may be deducted the estimated decrease in revenue due to the reduction in rates. This is placed at $1,700,000, (p. 185) and would leave a net adjusted telephone revenue of $13,375,180.

As already stated the average cost of the company's property for the year 1921 was $230,269,583. If it were accepted for the present purpose, the net return of $13,375,180 would be over 5.8 per cent on the full undepreciated amount. Then, if the depreciation reserve of $68,042,229.00 is deducted, there is a net investment of only $162,227,354 and a return of over 8 per cent upon the net investment.

In view of these results there is no possible ground for declaring the temporary rates confiscatory. It must be remembered that the operating expenses include all operating costs claimed by appellee, including all actual renewals and replace-

ments, but without providing any additional accumulation of depreciation reserve which already stood at 30 per cent of the original cost of the property.

But further to justify the temporary omission of continued accumulation of depreciation reserve until final findings by the commission, we call the court's attention to the fact that in the above computation the actual charges for renewals and replacements for the first ten months of 1921 amounted to $3,756,241, equivalent to $4,500,000 a year. This is a much greater expenditure than was made in any prior year; the highest previous charge was $3,809,422 in 1913. If, therefore, the actual cost of renewals and replacements are allowed, amounting to $4,500,000 for the full year, the company is treated fairly and would be earning a return of over 8 per cent upon the investment. There is thus no possible ground for the charge of confiscation, and the Commission's order should be upheld.

Conclusion

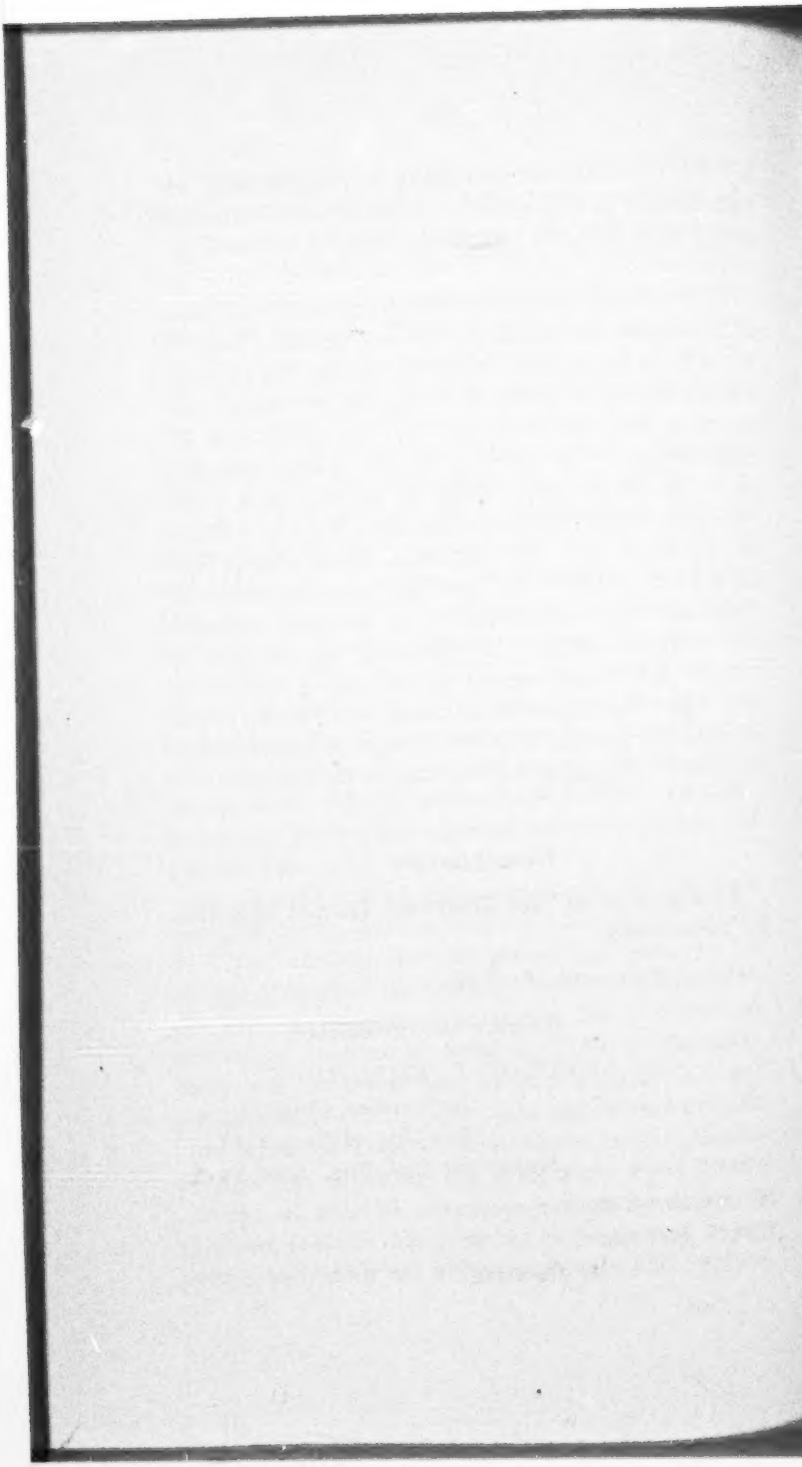
The order of the District Court should be reversed.

Dated, February 10, 1923.

Respectfully submitted,

GEORGE P. NICHOLSON,
Corporation Counsel,
The City of New York,
Municipal Building, New York.

M. MALDWIN FERTIG,
HARRY HERTZOFF,
of Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1922.

No. 542.

WILLIAM A. PRENDERGAST, et al., constituting the Public Service Commission, et al.,

Appellants,

against

NEW YORK TELEPHONE COMPANY,

Appellee.

AFFIDAVIT AND NOTICE OF MOTION

GEORGE P. NICHOLSON,
Corporation Counsel,
The City of New York,
Municipal Building, New York.

M. MALDWIN FERTIG,
HARRY HERTZOFF,
Of Counsel.

(19169) M. B. Brown Printing & Binding Co., New York

Supreme Court of the United States,

OCTOBER TERM, 1922.

WILLIAM A. PRENDERGAST, et al., constituting the Public Service Commission, et al., Appellants, *against* NEW YORK TELEPHONE COMPANY, Appellee.	Calendar No. 542.

Sirs—Please Take Notice that upon the annexed affidavit of M. Maldwin Fertig, verified the 11th day of January, 1923, and upon the record in City of New York against New York Telephone Company (Case No. 588, October Term 1922), I will move the Supreme Court of the United States at Washington, D. C., on Monday, the 15th day of January, 1923, at 12 o'clock noon, at the opening of said court for motions, or as soon thereafter as

counsel can be heard, for leave to file a brief as *amicus curiae*, on the above-entitled appeal.

Dated, New York, January 11th, 1923.

Yours, etc.,

GEORGE P. NICHOLSON,
Corporation Counsel,
The City of New York,
Municipal Building,
New York.

To

CHARLES T. RUSSELL, Esq.,
STETSON, JENNINGS & RUSSELL, Esqs.
Solicitors for Appellee,
15 Dey Street,
New York.

To

CARL SHERMAN, Esq.,
Attorney General,
Albany, New York.

To

PUBLIC SERVICE COMMISSION,
Albany, New York.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

WILLIAM A. PRENDERGAST, et al., constituting the Public Service Commission, et al., Appellants, *against* NEW YORK TELEPHONE COMPANY, Appellee.	Calendar No. 542.

State of New York,
City of New York,
Southern District of New York, } *ss.:*

M. Maldwin Fertig, being duly sworn, says: that he is an Assistant Corporation Counsel of The City of New York, and is familiar with the proceedings herein and appeared as representing the City of New York in the case before the Public Service Commission.

This action was instituted by the New York Telephone Company on March 29, 1922, and prayed for an injunction to restrain the appellants from enforcing the orders of the Public Service Commission dated March 3, 1922.

The injunction herein restrains orders of the Public Service Commission affecting telephone rates in The City of New York and in the State of New York respectively. As to the former, the City appeared throughout in a proceeding lasting about two years, and as to the State Case, the City appeared practically throughout.

The City of New York is the largest subscriber of telephone service of the New York Telephone Company in The City of New York.

The City of New York engaged the necessary technical aid to handle the intricate, complex question involved and has incurred an expense of upwards of one hundred thousand dollars in the preparation of the case before the Public Service Commission.

The City of New York applied for permission to intervene as a party defendant and an order was entered on July 29, 1922, denying the City's petition.

An appeal was taken to this Court (Calendar No. 588, October Term, 1922), and a motion was made to advance this appeal. This Court granted the said motion and advanced the appeal for argument on February 19, 1923, upon which date it also set for argument the appeal herein.

Much of the record herein on appellants behalf was prepared by experts retained by the City of New York.

In view of the fact that this Court now has before it the appeal in Case No. 588 with reference to the right of the City of New York to be allowed to become a party in the action herein, it desires to file a brief as *amicus curiae* until its status is established.

Wherefore The City of New York asks for leave to file a brief as *amicus curiae*.

M. MALDWIN FERTIG.

Sworn to before me this
11th of January, 1923.

HARRY HERTZOFF,
Commissioner of Deeds of
The City of New York.

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 542.

WILLIAM A. PRENDERGAST, ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL., *Appellants*,

AGAINST

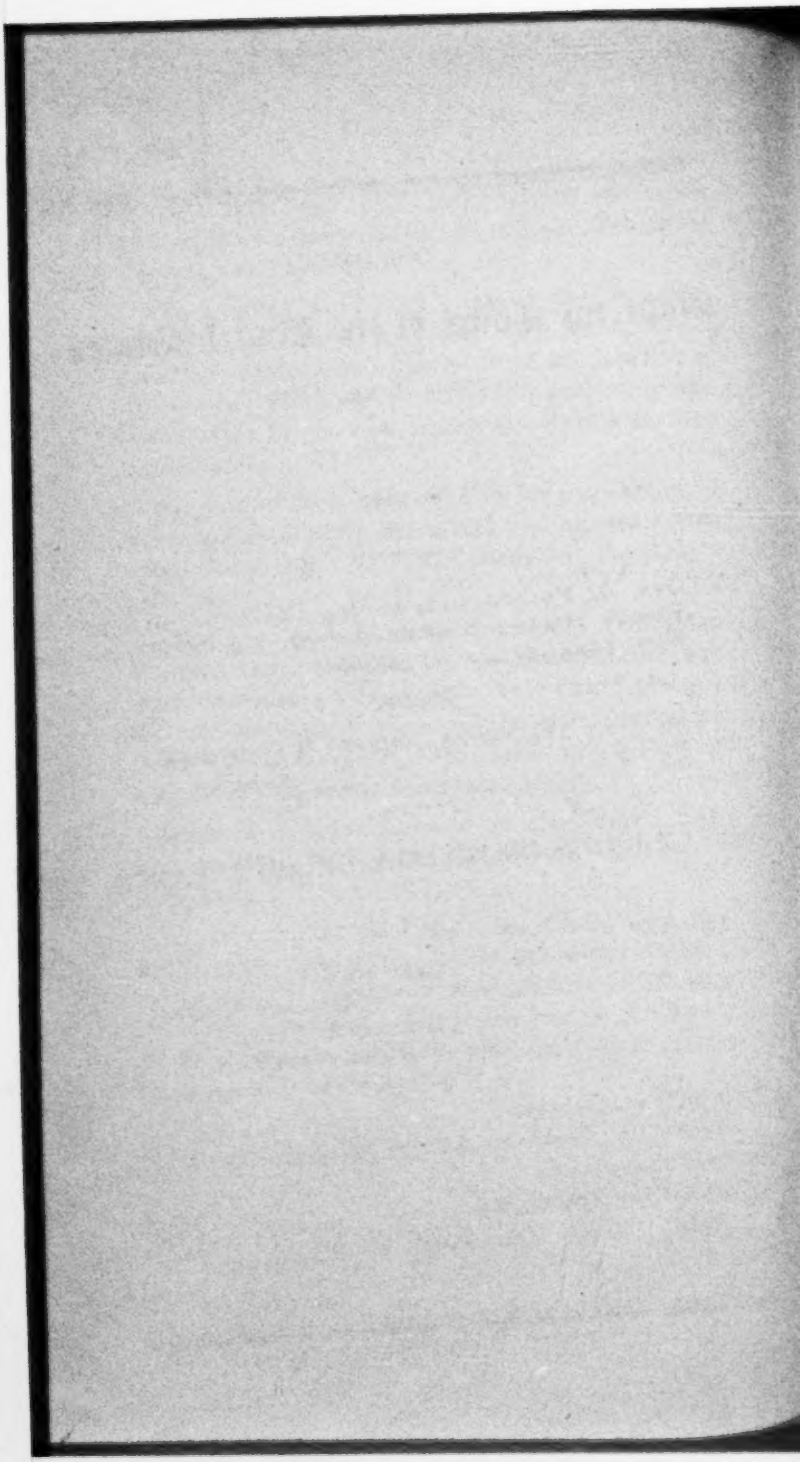
NEW YORK TELEPHONE COMPANY, A CORPORATION, *Appellee.*

REPLY BRIEF ON BEHALF OF APPELLANTS.

CARL SHERMAN,
Attorney General.
LEDYARD P. HALE,
Solicitor for Appellants,
Public Service Com., et al.

WILBER W. CHAMBERS,
Counsel for Appellant Attorney General,
SIMON FLEISCHMANN,
Counsel for Appellants,
Public Service Commission, et al.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 542.

WILLIAM A. PRENDERGAST, ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL., *Appellants*,

AGAINST

NEW YORK TELEPHONE COMPANY, A CORPORATION, *Appellee*.

REPLY BRIEF ON BEHALF OF APPELLANTS.

Some statements in appellee's brief call for comment to prevent misapprehension.

I.

Appellee cites appellants' brief for the assertion that the temporary rates under the orders effected an annual estimated reduction of $2,900,000, under the company's figures or $2,700,000 under those of the Commission. Appellees omit the further ensuing

statement from page 42 of appellants' brief that the expert of the Commission stated that decrease in operating expenses in 1922 would amount to $3,200,000 leaving revenues either $300,000 or $500,000 in excess of those in 1921. The incomplete reference to appellants' brief might cause misapprehension.

II.

There appears in appellee's brief on this appeal from the interlocutory injunction order of June 12, 1922 (p. 186), which restrained the enforcement of the *temporary rate orders* of March 3, 1922, not only references to, but an anlaysis of the *permanent rate order* made by the Commission several months thereafter, *i. e.*, January 25, 1923, which could not possibly have been before the court below which granted the temporary injunction, constitutes no part of the record on this appeal, and, as we respectfully submit, is therefore not properly before this court on this appeal, and which the appellants therefore did not consider it proper to advert to in their brief (see appellees' brief, pp. 3, 8, 23, 24, 29).

The effect of this must be to change the questions of law or inferences of fact or of law to be presented to this Appellate Court from those that were and of necessity could alone have been presented to and considered by the court below. This would obviously constitute unprecedented appellate procedure and one which ignores fundamental principles of appellate jurisdiction which is limited to a consideration of the precise record which was before the court below.

The only question that can properly be argued before and considered by this court, on this appeal is

whether the court below was justified, *upon the pleadings, and papers before it*, in granting the interlocutory injunction, from which a separate and preliminary appeal is given as matter of right, by express provision of law (Sec. 266 Judicial Code), to review this intermediate order.

We have in mind that appellee has filed and served motion papers to dismiss this appeal or to affirm the order because of the subsequent permanent rate orders of the Commission above referred to but such motion was not filed or noticed until sometime after appellants filed their brief on this appeal and said motion is not returnable before this court until March 5, 1922, without special leave to have the same heard sooner, whereas the argument of this appeal was in October, 1922, set for argument for February 19, 1923.

In this situation we earnestly submit that whatever justification there may be for bringing to the attention to this court in connection with this appeal, the subsequent action of the Commission as formulated in its permanent rate orders, which we challenge, such a motion should in any event have been separated from this appeal and excluded from the briefs on the same and confined to the papers relating to the motion where appellants would have a fuller opportunity to meet the same as a distinct proposition. The confusion resulting from this procedure is regretable. We are, therefore, reluctantly compelled to refer to the permanent rate orders in this reply brief, but only in so far as is necessary to meet this subject-matter which has been injected by appellee in its brief.

The appellants respectfully urge that this appeal be determined upon the record which was before the court below, to the end that the validity or invalidity

of the drastic ruling and important precedent thereby established and which will remain if not reversed, shall be authoritatively determined and the Commission be guided in its future proceedings with full knowledge of the circumstances under which and the juncture at which the intervention of the Federal Courts will be justified and sanctioned.

The question presented upon this appeal is of large and far reaching importance, and indeed involves the establishment of a definite line of cleavage between Federal and State power, and the limiting of each to its proper sphere.

Appellee goes still further and asserts (p. 3, appellees' brief) that the permanent rate orders will yield an annual revenue of $2,000,000 above that received under the rates in force when the temporary rate orders were made and about $5,000,000 above that which would have been afforded by the temporary rates. The appellee's motion papers show that these figures are based on mere estimates of two affiants, Welch, general commercial superintendent, and Briggs, attorney of appellee (appellee's motion papers, pp. 7-9).

In this connection a statement issued by the Commission with its permanent rate orders, showed that the permanent rates would yield appellee 7 per cent on the value of its property and a computation will show that even if the above figures given by appellee as to reduced income were definite instead of estimated, the appellee would have received even under the temporary rates much more than the two to three per cent which it asserted in its bill of complaint was all that the temporary rates would yield (compl't p. 8).

III.

Appellee under point IV of its brief argues that the temporary rate orders were final legislative acts and therefore at once judicially reviewable.

We respectfully and emphatically challenge this contention alike under the statutory provisions of the laws of the State of New York, the decisions of its courts and of the Federal courts, including this court. In addition to the arguments in our original brief (pp. 15-32), we invite attention to the following considerations, suggested by appellee's brief.

Appellee in citing *Chicago R. Co. v. Illinois Commerce Comm.*, 277 Fed. 970, fails to give proper force to the following vital statement in the opinion of the court:

> "If the State of Illinois, vesting the power to regulate rates in the Commerce Commission had provided that the order of the Commission should not be put into effect until after a certain time, within which an application for a rehearing could be made, another question would be involved * * *."

In the instant case, we have not only a statutory provision of this kind but a stronger situation growing out of the fact that the temporary rate orders, upon the face thereof provide, that the temporary rates provided for by orders of March 3, 1922, shall not become operative at all until April 1, 1922 (p. 28, fol. 43; p. 29 fol. 47), and further specifically provide that the company as well as the municipalities of the state may apply for a modification thereof by written application on or before April 15, 1922 (p. 38, fol. 55).

These orders therefore by their express provisions show conclusively upon their face that they do not constitute final legislative rate making action and could not be judicially reviewed before appellee exhausted its remedy thereunder irrespective of the right given by the Public Service Commission law to apply for a re-hearing.

So under express provision of the Civil Practice Act of the State of New York, section 1286, it is clear that the proceedings before the Commission had not reached the judicial stage when appellee invoked the aid of the Federal Court, as that law provides that certiorari which affords a review of rate order cannot be granted:

> "Where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application, unless the determination, to be reviewed was made upon a re-hearing or a re-hearing has been denied; or the time within which the petitioner can procure a re-hearing has elapsed."

The legislative act of the Commission was thus not complete nor had it reached the judicial stage in any view of the case, alike by reason of the provisions of the order, providing for an application to modify it and by the Public Service Commission law itself granting leave to apply for a re-hearing and the Civil Practice Act preventing a judicial review without prior application for a re-hearing.

IV.

Appellee (p. 24 its brief), appears to regard as conclusive the statement of the court below in its opinion

to the effect that no computation can reduce the rate base much below $300,000,000.

As the appellee has brought before this court the final orders of the commission finding permanent rates, we call attention to the fact that in the decision of the commission, giving detailed figures as to such rate base, the Commission finds that the fair value of the company's property used in the public service, including an allowance of $9,685,000 for working capital, and $24,510,177 for construction work in progress, aggregated $208,680,168, which figure is comparable with the $300,000,000 assumed by the court below, being for the same period. The Commission increases this valuation for 1923 to $246,182,491 which also includes $10,497,500, for working capital, and $34,300,000 construction work in progress.

As the final finding of the Commission was based on voluminous evidence and a careful investigation and that of the court below on mere affidavits, it involves no disrespect to the court below to claim validity for the finding of the Commission in preference to that of the court as to the proper and correct rate base.

The Commission indeed formulated this view in the following statement in its decision:

> "The United States Court in granting the injunction restraining temporary rates established by the order, of March 3, 1922, in its opinion stated 'that no computation can reduce the basis for return much below $300,000,000.' With due regard for the statement of the court expressing an opinion on fair value based on affidavits submitted in the injunction proceeding, we cannot allow a greater valuation than is hereinbefore set forth."

V.

We respectfully renew our request for a reversal of the interlocutory injunction order appealed from.

Washington, D. C., Feb. 19, 1923.

CARL SHERMAN,
Attorney General.
LEDYARD P. HALE,
Solicitor for Appellants,
Public Service Com., et al.

WILBER W. CHAMBERS,
Counsel for Appellant Attorney General,
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